

1361 United States
Circuit Court of Appeals
1361
For the Ninth Circuit.

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bankruptcy of the Estate of A. E. BUCKMAN, Bankrupt, and H. M. WRIGHT, A. E. BUCKMAN, WILLIAM H. CHAPMAN, FILLMORE BUCKMAN, J. A. MEADOWS, SUNSET CONSTRUCTION COMPANY, a Corporation, and J. A. MEADOWS, JOHN McCOY and A. E. BUCKMAN, Trustees of the Defendant, SUNSET CONSTRUCTION COMPANY,

Appellees,

and

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bankruptcy of the Estate of A. E. BUCKMAN, Bankrupt, and A. E. BUCKMAN, WILLIAM H. CHAPMAN, FILLMORE BUCKMAN, J. A. MEADOWS, SUNSET CONSTRUCTION COMPANY, a Corporation, and J. A. MEADOWS, JOHN McCOY and A. E. BUCKMAN, Trustees of the Defendant, SUNSET CONSTRUCTION COMPANY,

Appellees.

Transcript of Record.

Upon Appeals from the Southern Division of the United States
District Court for the Northern District of
California, Third Division.

FILED
SEP 25 1923

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Names and Addresses of Attorneys of Record.

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Attorneys for Appellant, J. J. Rauer.

CHARLES S. WHEELER and CHARLES S. WHEELER, Jr., Esqrs., and E. H. WILLIAMS, Esq.,

Nevada Bank Bldg., San Francisco, Calif.,

Attorneys for Appellees.

In the District Court of the United States of America, for the Northern District of California, Second Division.

No. 233—IN EQUITY.

R. CORDS, Jr., Trustee in Bankruptcy of A. E. BUCKMAN, Bankrupt,

Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. H. CHAPMAN, FILMORE BUCKMAN, JOHN DOE MEADOWS, and SUNSET CONSTRUCTION COMPANY, a Corporation,
Defendants.

Bill in Equity.

Plaintiff complains of the defendants above named and for cause of action against them alleges;

I.

That plaintiff is a citizen of the State of California and a resident of the city and county of San Francisco, in said State; that defendants A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman and John Doe Meadows are residents of said city and county of San Francisco and citizens of said State of California; that defendant Sunset Construction Company is a corporation organized and existing under the laws of the State of California, and has its principal place of business in the city and county of San Francisco, aforesaid. That the true name of the defendant herein designated John Doe Meadows is unknown to plaintiff who begs leave to amend by the insertion of such true name when the same be ascertained.

II.

That heretofore on the 19th day of February, 1915, defendant A. E. Buckman filed in the District Court of the United States for the Northern District of California, sitting as a Court of Bankruptcy, his voluntary petition in bankruptcy, and thereafter on said day was duly adjudged a bankrupt by said Court, and the matter of A. E. Buckman, bankrupt, was [1*] by said Court, referred to Hon. A. B. Kreft, a duly appointed, qualified and acting referee in bankruptcy of said court, for further proceedings. That thereafter on the 9th day of March, 1915, after the notice required by law had been given to said bankrupt and to the creditors of said bankrupt, a first meeting of said

*Page-number appearing at foot of page of original certified Transcript of Record.

creditors was held at the time and at the place specified in said notice, and at said meeting of said creditors this plaintiff R. Cords, Jr., was duly and regularly elected Trustee in Bankruptcy of A. E. Buckman, bankrupt, and thereafter on the 17th day of March, 1915, said trustee filed with said referee in bankruptcy a good and sufficient bond in the sum of \$100.00 as required by law and the order of said referee. That on said day said referee made his order approving said bond, and said R. Cords, Jr., became and ever since has been the duly elected, qualified and acting Trustee in Bankruptcy of A. E. Buckman, bankrupt. That by reason of the residence and citizenship of the parties hereto, and the fact that this action arises under the Bankruptcy Statutes of the United States of America, this Court has jurisdiction hereof.

III.

That defendant Sunset Construction Company was organized as a corporation under the laws of the State of California, on the 12th day of December, 1911; that said corporation was formed and organized by defendant A. E. Buckman for the purpose of carrying on a general contracting and construction business. That said corporation was formed and organized as a cover for the activities and operations of said A. E. Buckman, and for the purpose of concealing the identity of said A. E. Buckman under the form and legal entity and name of said corporation. That said A. E. Buckman immediately became the owner of all of the

outstanding, subscribed shares [2] of the capital stock of said corporation, with the exception of two shares issued, one each, to defendant Wm. H. Chapman, and one J. Maury, for the purpose of incorporation, and said A. E. Buckman ever since has owned all of said outstanding subscribed capital stock, and ever since has completely owned, operated and managed said corporation for his sole benefit. That the organization and formation of said corporation amounted to nothing more, and has amounted to nothing more, than the placing in a corporate form of the capital of said Buckman and his abilities as a general construction contractor.

IV.

That defendant Wm. H. Chapman, is and has been since the formation of said Sunset Construction Company the president thereof, and defendant Filmore Buckman, is and has been since the formation of said corporation the secretary thereof.

V.

That in January, 1914, defendant A. E. Buckman delivered and transferred to defendant J. J. Rauer all of the capital of said corporation, the Sunset Construction Company, owned by said A. E. Buckman; that said delivery and transfer was without consideration and was made by said A. E. Buckman in contemplation of insolvency, and left said Buckman without sufficient funds or property to meet his debts and obligations then due and owing, and was made with intent to hinder, delay and defraud the creditors of said A. E. Buckman

and said creditors were thereby hindered, delayed and defrauded.

VI.

That at some time subsequent to January, 1914, the exact date of which is unknown to plaintiff, said defendant J. J. Rauer delivered and transferred to defendant John Doe Meadows the shares of said capital stock delivered and transferred to said Rauer by said A. E. Buckman, as hereinbefore alleged. That said transfer from defendant A. E. Buckman to [3] defendant Rauer, and from defendant Rauer to defendant Meadows was made as the result of a conspiracy and agreement between defendant A. E. Buckman, Rauer, Chapman, Filmore Buckman, and Meadows to hinder, delay and defraud the creditors of defendant A. E. Buckman and to withhold from them the shares of the capital stock of said Sunset Construction Company owned by said A. E. Buckman, and to retain for themselves the management, operation, benefits and profits of said corporation. That neither said Rauer nor said Meadows paid or gave any consideration whatsoever for said shares but accepted said shares with intent to aid and abet in hindering, delaying and defrauding the creditors of said A. E. Buckman, and with full knowledge of the intent of said A. E. Buckman to hinder, delay and defraud his creditors. That said Meadows now holds said shares upon a secret trust for the benefit of said defendants A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman, and himself. That said A. E. Buckman, J. J. Rauer, Wm. H.

Chapman, Filmore Buckman, and John Doe Meadows are now, and ever since January, 1914, have been operating and carrying on said corporation and its business for the benefit of each of them and receiving the profits thereof.

VII.

That the estate in bankruptcy of A. E. Buckman, bankrupt, is insufficient to pay or satisfy the claims against said estate, unless said shares of the capital stock of the Sunset Construction Company and the assets of said corporation be subjected to the payment of said claims and considered as part of said estate in bankruptcy. That the verified schedule of said bankrupt filed with his said petition in bankruptcy discloses unsecured debts and obligations amounting to a sum in excess of \$150,000.00 to meet which there are now assets of said estate.

WHEREFORE, plaintiff prays, [4]

1. That he be declared to be the owner, as trustee in bankruptcy of A. E. Buckman, of said shares of the capital stock of the Sunset Construction Company.

2. That it be decreed that the attempted transfer of said shares from said A. E. Buckman to defendant J. J. Rauer, and from said Rauer to said defendant John Doe Meadows be declared null and void and of no force or effect.

3. That said defendants A. E. Buckman, Rauer, Chapman, Filmore Buckman and John Doe Meadows be directed to deliver to plaintiff said shares and the assets, properties, books, contracts of said

Sunset Construction Company, and the management and control thereof.

4. That an accounting be had from said defendants of the assets and profits of said corporation since the month of January, 1914.

5. For such other and further relief as may be proper and equitable, and for costs herein.

THOMAS H. LAINE and
LAURENCE M. PHILLIPS,
GEORGE J. HATFIELD,

Solicitors for Plaintiff.

[Endorsed]: Filed Oct. 27, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[5]

(Title of Court and Cause.)

Answer.

Now comes the defendant in the above-entitled suit and for answer to the bill of plaintiff therein admit, allege and deny as follows:

I.

Defendants deny that the Sunset Construction Company was formed or organized by the defendant, A. E. Buckman, but was organized by its incorporators for the carrying on of a general contracting and construction business, and these defendants deny that said corporation was formed or organized as a cover for the activities or operations of the defendant, A. E. Buckman, or for the purpose of concealing the identity of said A. E. Buckman

under the form or legal entity or name of said corporation.

Defendants deny that A. E. Buckman ever since the formation or organization of the Sunset Construction Company, has owned all of the outstanding subscribed capital stock of said corporation, and deny that ever since said formation or organization he has completely owned or operated or managed said corporation for his sole benefit; and defendants deny that the organization or formation of said corporation amounted to nothing more, or has amounted to nothing more than the placing in a corporate form of the capital of said Buckman, or his abilities, as a general construction contractor.

II.

Defendants deny that in January, 1914, or at any other time or at all, the defendant, A. E. Buckman, delivered or transferred to the defendant, J. J. Rauer, all of the capital stock of said corporation, the Sunset Construction Company, owned by said A. E. Buckman, and defendants deny that said [6] alleged or any delivery or transfer was without consideration or was made by said A. E. Buckman, or at all, in contemplation of insolvency, or left said Buckman without sufficient funds or property to meet his debts or obligations then or at all due or owing, and deny that the same was made with intent to hinder or delay or defraud the creditors of said A. E. Buckman, and deny that said creditors were thereby, or at all, hindered or delayed or defrauded.

Defendants allege that the facts concerning the disposition of any shares of stock owned or controlled by the defendant, A. E. Buckman, was as follows:

On the 15th day of January, 1914, the Sunset Construction Company was indebted to the defendant J. J. Rauer, in the sum of \$20,000.00, for and on account of moneys loaned by said defendant, J. J. Rauer, to the said Sunset Construction Company, and for the better protection and security of said J. J. Rauer for said sum of money so loaned, as aforesaid, the defendant, A. E. Buckman pledged to the said J. J. Rauer, 10,150 shares of the capital stock of the said Sunset Construction Company on said 15th day of January, 1914; thereafter and on the 12th day of August, 1914, the said defendant, J. J. Rauer, sold said 10,150 shares of the capital stock of the Sunset Construction Company to satisfy in part the indebtedness to him of the Sunset Construction Company and said stock was sold for the sum of \$50.00 to H. Wehrle, and thereafter the said H. Wehrle sold and transferred said 10,150 shares of stock to the defendant, J. A. Meadows, sued herein as defendant, John Doe Meadows, and said J. A. Meadows ever since the sale to him of said shares of stock has been the owner and holder thereof.

III.

Defendants deny that subsequent to January, 1914, or at any other time or at all, the defendant, J. J. Rauer, delivered or [7] transferred to defendant, Meadows, any of the shares of the capital

stock of the said Sunset Construction Company, and defendants deny that any transfer of stock to the defendant, Meadows, was made as the result of a conspiracy or agreement between defendants A. E. Buckman, J. J. Bauer, Wm. H. Chapman, Filmore Buckman and Meadows, or any or either of them, to hinder or delay or defraud the creditors of defendant, A. E. Buckman, or to withhold from them, or either of them, the shares of the capital stock of the said Sunset Construction Company, owned by the said A. E. Buckman, or otherwise or at all, or to retain for themselves, or either of them, the management, operation, benefits or profits of said corporation, and defendants deny that neither said Rauer nor said Meadows paid or gave any consideration whatsoever for said shares, and deny that they or either of them, accepted said shares with intent to aid or abet in hindering, or delaying, or defrauding the creditors of said A. E. Buckman, or with full knowledge of the intent of said A. E. Buckman to hinder or delay or defraud his creditors. And deny that said Meadows now holds said shares upon a secret trust or any trust for the benefit of said defendants, A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman and J. A. Meadows, or either of them. And deny that said A. E. Buckman, J. J. Rauer, Wm. H. Chapman, Filmore Buckman and J. A. Meadows, or either of them, are now, or ever since January, 1914, have been operating and carrying on said corporation and its business for the benefit of each of them and receiving the profits thereof.

In respect to the foregoing and particularly alleging with respect to the affairs of the Sunset Construction Company, these defendants allege that the Sunset Construction Company has owed large sums of money to the defendant, J. J. Rauer, for many years last past, which sums of money have been greatly increasing in amount, commencing with the 9th day of March, 1911, when [8] said defendant J. J. Rauer, loaned to said Sunset Construction Company the sum of \$500.00, thereafter various sums of money were loaned by said J. J. Rauer to said Sunset Construction Company, and at various times balances were struck between said J. J. Rauer and said Sunset Construction Company, and said balances at various times were as follows: On February 1, 1912, said corporation owed to said defendant, J. J. Rauer, the sum of \$15,000.00; on the 14th day of February, 1913, the sum of \$20,734.00; on December 6, 1913, the sum of \$20,000.00; on December 1, 1915, the date of the filing of the bill herein, the sum of \$34,770.94. Also defendants allege that on the 16th day of June, 1914, the Sunset Construction by resolution of its Board of Directors thereunto duly authorized, gave to H. Wehrle, a personal property mortgage covering all the personal property of the Sunset Construction Company to secure the payment of a promissory note dated said 16th day of June, 1914, for the sum of \$5,000.00, and to cover further advances, and said personal property mortgage was duly acknowledged by said Sunset Construction Company on the 16th day of June, 1914, and

said personal property mortgage was accompanied or had attached thereto an affidavit of all the parties thereto to the effect that it was made in good faith and without any design to hinder, delay or defraud creditors, and that said personal property mortgage was recorded on the 3d day of July, 1914, in the office of the County Recorder of the city and County of San Francisco, State of California, in Liber 70 of Personal Property Mortgages, at page 388. And that on the 18th day of June, 1914, the said H. Werle advanced to the said Sunset Construction Company, the sum of \$10,000, which sum was secured by the aforesaid personal property mortgage under the terms and conditions thereof; that the personal property mentioned in the aforesaid personal property mortgage is of the market value of \$5,000.00, or thereabouts, and that [9] said Sunset Construction Company had no other property at the date of the filing of the bill herein, and other than its open book accounts and interests in contracts, said corporation had no other property for a long time prior to the filing of the bill herein, and defendants respectfully represent that said shares of stock of said Sunset Construction Company now owned and held by said J. A. Meadows have no market value and had no market value at the time of the sale thereof by the said J. J. Rauer to foreclose the pledge thereof, as aforesaid.

Defendants further state that besides the foregoing indebtedness of the Sunset Construction Company, there is due and owing to various creditors

of the said Sunset Construction Company on open book accounts large sums of money, and that on the 1st day of July, 1915, an inventory and appraisal of all the assets and property of said Sunset Construction Company was taken and its liabilities ascertained, and a balance was struck under the general heading of Bills Receivable in the sum of \$61,526, and Bills Payable in the sum of \$103,430, leaving a deficit of assets of \$41,904.

IV.

Defendants deny that the estate in bankruptcy of A. E. Buckman, bankrupt, will be aided or assisted in any manner, or that there will be sufficient to pay or satisfy in any manner the claims against said estate, by or through the application or the subjection of the shares of the capital stock of the Sunset Construction Company, or the assets of said corporation to the payment of said claims, and defendants deny that even if said capital stock of said Sunset Construction Company be considered as a part of the estate of said bankrupt, that said bankrupt estate will thereby be enhanced in value to any extent, and defendants deny that there are any assets [10] belonging to the Sunset Construction Company.

WHEREFORE, defendants pray that plaintiff take nothing by reason of this action and that defendants have judgment for their costs herein.

H. M. ANTHONY,
Solicitor for Defendants.

Due service and a receipt of a copy of the within answer is hereby admitted this 23d day of December, 1915.

THOMAS H. LAINE and LAURENCE M.
PHILLIPS and GEORGE J. HAT-
FIELD.

[Endorsed]: Filed Dec. 23, 1915. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[11]

(Title of Court and Cause.)

Supplement to Bill and to Answer.

It is hereby stipulated and agreed by and between the parties to the above-entitled action that the bill in said action shall be supplemented by the substitution of the name J. A. Meadows, in said bill, for and in the place and stead of the name John Doe Meadows wherever said name John Doe Meadows appears in said bill; and it is further stipulated and agreed by and between said parties that the Answer of defendants to the bill above mentioned shall stand as their answer to said bill as hereby supplemented.

THOMAS H. LAINE and
GEORGE J. HATFIELD,

Attorneys for Plaintiff.

H. M. ANTHONY,

Attorney for Defendants.

The above supplement is this day ordered filed.

Dated: February 9th, 1916.

WM. C. VAN FLEET,
Judge of Above-entitled Court.

[Endorsed]: Filed February 9, 1916. Walter B. Maling, Clerk. [12]

(Title of Court and Cause.)

Interlocutory Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz:

1. That A. E. Buckman at all times, and up to and on the 19th day of February 1915, was the owner of all the issued and outstanding capital stock of the Sunset Construction Company, a corporation, and that on said last mentioned day said stock vested in and became, and now is, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt.

2. That A. E. Buckman at all times, and up to and on the 19th day of February 1915, was the owner of the Sunset Construction Company, a corporation, and of all of the property, books, and records of said company and that on said last mentioned day said company, property, books, and records vested in and became, and now are, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt, and that said property be held by said Cords pending an accounting between said company and defendants A. E. Buckman, J. J. Rauer, Filmore Buckman and Wm. H. Chapman.

3. That defendants A. E. Buckman, J. J. Rauer, Filmore Buckman, and Wm. H. Chapman severally

account for all moneys or property received by them from, or advanced by them to, defendant Sunset Construction Company since the 12th day of December, 1911, whether such transactions were made in the names of third persons or in the names of said parties, for the purpose of determining what claims, if any, exist between said company and said persons.

4. That for the purpose of taking said above-mentioned accounting said cause be referred to H. M. Wright, Master in [13] Chancery of this Court, to take and examine said account and report thereon to this Court.

Dated September 11th, 1916.

WM. C. VAN FLEET,

Judge of the District Court of the United States for
the Northern District of California.

[Endorsed]: Filed and Entered September 11, 1916. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [14]

(Title of Court and Cause.)

Stipulation and Order Substituting George J. Hatfield as Plaintiff for and in the Place of R. Cords, Jr.

It is hereby stipulated and agreed that R. Cords Jr., plaintiff above named resigned as trustee in bankruptcy of A. E. Buckman on the 15th day of January 1917 and that George J. Hatfield was thereafter appointed, and now is, the duly appointed,

qualified and acting trustee in bankruptcy of A. E. Buckman, bankrupt.

It is further stipulated and agreed that George J. Hatfield, as trustee in bankruptcy of the estate of A. E. Buckman, bankrupt, is the successor in interest of all of the interest of R. Cords Jr., in the above-entitled and numbered suit and that said Hatfield may be substituted for and in the place of said Cords as plaintiff in said suit and that this stipulation may be used in lieu of a supplemental bill in said suit.

H. M. ANTHONY,

Attorney for Defendants.

THOMAS H. LAINE,

Attorney for R. Cords Jr., Trustee, etc.

IT IS ORDERED that George J. Hatfield, trustee in bankruptcy of the estate of A. E. Buckman, bankrupt, be and he is hereby substituted as plaintiff in the above-entitled and numbered suit for and in the place of R. Cords, Jr.

Dated May 5th, 1917.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed May 5, 1917. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [15]

(Title of Court and Cause.)

Order Continuing Master's Authority.

The above cause having been heretofore referred to H. M. Wright, then Standing Master in Chancery of this court, and his final report not having been

filed; and said officer having resigned his said office on December 31, 1919; now that no question may arise as to his authority to complete said hearing and make his final report therein:

IT IS HEREBY ORDERED that said cause stand referred to said H. M. Wright as a Special Master in Chancery from the date of his said resignation until the completion of his duties, with the powers and directions contained in the original order of reference herein.

Dated, January 31st, 1920.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 2, 1920. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

In the Southern Division of the District Court of
the United States in and for the Northern Dis-
trict of California, Second Division.

No. 233—IN EQUITY.

GEORGE J. HATFIELD, Substituted for
R. CORDS, JR., as Trustee of the Estate of
A. E. BUCKMAN, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. H. CHAP-
MAN, FILLMORE BUCKMAN, SUNSET
CONSTRUCTION COMPANY, a Corpora-
tion et al.,

Defendants.

Master's Report on Accounting.

By the interlocutory decree of this Court entered September 11, 1916, it was decreed that on the 19th day of February, 1915, A. E. Buckman was the owner of all the capital stock of the Sunset Construction Company and that on said date, the stock vested in his trustee in bankruptcy; that likewise, on that day, Buckman was the owner of the company and all of its property, books and records and that on the date of adjudication in bankruptcy, as stated, such property vested in the trustee. The defendants, A. E. Buckman, J. J. Rauer, Fillmore Buckman and William H. Chapman were ordered to severally account "For all moneys or property received by them from or advanced by them to defendant Sunset Construction Company since the 12th day of December 1911, whether such transactions were made in the names of third persons or in the names of said parties, for the purpose of determining what claims if any [17] exist between said Company and said persons." The accounting mentioned was referred to the undersigned as Master in Chancery of the Court "To take and examine said accounts and report them to this Court."

On May 14, 1917, upon motion of Thomas H. Laine, Esq., then attorney for the plaintiff, the Master made his order directing A. E. Buckman, J. J. Rauer, Fillmore Buckman and William H. Chapman to file with him their respective accounts as required by said decree. The order is herewith separately returned. A. E. Buckman and Fillmore

Buckman have never complied with said order for the reason, it may be presumed, that the books of the Sunset Construction Company had been taken into the possession of the trustee in bankruptcy; but the filing of said statements has never been pressed by attorneys for the trustee. Defendant William H. Chapman filed his account in the form of an affidavit which is also separately returned. Chapman was the president and a director of the Sunset Construction Company, but these were nominal offices and his connection was really that of attorney for said company and said A. E. Buckman. The account shows no indebtedness by Chapman to the trustee at the date of bankruptcy and I so find. The principal accounting defendant was J. J. Rauer. In due course, he filed a statement of account which, for identification in these proceedings has been marked Exhibit 1. At the first hearing, he filed also a document called a statement in explanation of the account which has been identified as Defendant's Exhibit 2. During the proceedings, pursuant I think to the Master's order, said Rauer filed what is entitled "Amended and Supplemental Statement of J. J. Rauer on Accounting" and which was marked as Defendant's Exhibit 3. These three statements are also separately returned. [18]

On Monday, October 29, 1917, I was attended by Edwin H Williams, Esq., as attorney for the trustee, and H. M. Anthony, Esq., and Milton J. Green, Esq., as attorneys for the defendant Rauer. Later in the proceedings, Charles S. Wheeler, Jr., Esq., also appeared as attorney for the plaintiff; and

hearings were had October 29, 30, 31, November 2, 6, 8, 16, 30, and December 6, 1917. Proceedings were stenographically reported and a transcript thereof in two volumes is herewith separately returned. Thereafter briefs were filed as follows: By the plaintiff on May 4, 1918; by the defendant on November 7, 1918, and by the plaintiff in reply on February 18, 1919. Said briefs were separately returned. Thereafter by stipulation of counsel for all parties, the hearings were reopened for further testimony, which was had on March 1, 3 and 10, 1920. A transcript of said testimony is also separately returned. During the proceedings a large number of books of account, checks and other documentary material was received in evidence and are separately returned. A list of said exhibits is annexed to this report. They do not bear consecutive exhibit numbers. The said transcript of testimony together with said exhibits and the exhibits in the main case, and the briefs of the parties have furnished all the evidence upon which this report is based. I also return certain objections in writing filed by plaintiff to the first account of defendant Rauer hereinabove mentioned.

A word should be said with regard to the delay of one year since the submission, in rendering this report. The reason is reflected in the extended time that counsel took to file their briefs (as the dates of filing indicate) namely, the extreme complexity of the facts and the obscure nature of the evidence from which the facts were derivable. I realized when the case was submitted [19] that many

weeks of solid time would be necessary to dispose of this matter and form intelligent conclusions and consequently it has been necessary to delay until that time was available. I may say that in an experience of over ten years as Master of this Court, this has been the most difficult case that has come before me so far as the determination of the facts is concerned. Many things have brought this about. Neither the Sunset Construction Company nor the defendant Rauer kept adequate books of account. The transcript of testimony is frequently obscure. The witness Rauer did not confine himself to clear answers to questions, but volunteered much that was not pertinent, thus destroying the orderly presentation of the facts. The briefs lack specific references to the pages of the transcript. The statements filed are confused, misarranged and not at all complete. Transactions that are pertinent to this hearing and transactions not pertinent are all included and a sifting out process has been necessary. It was a work which, for the best interests both of the trustee and of the defendant Rauer, required the services of a skilled accountant to assist the Master in his determination, but no such help was forthcoming. The witness Clark, offered by Rauer as an expert accountant is evidently nothing more than an ordinary bookkeeper and a very partisan one at that. The bulk of the testimony and of the briefs has, of course, increased the difficulties. The presentation in the briefs, however, has been done in an orderly fashion and I shall follow that order in my report.

The facts necessary to an understanding of the accounting may be briefly stated. The Sunset Construction Company were contractors for grading and street work. A. E. Buckman owned all its stock and was the general manager; Chapman was the president; [20] Fillmore Buckman was the secretary. Defendant J. J. Rauer is a private money lender of San Francisco, who began lending money to Buckman or his *alter ego*, the Sunset Construction Company, in 1911; continued to do so during the period up to Buckman's adjudication in bankruptcy on February 19, 1915, and thereafter until Buckman's death about 1918 or 1919. Either in ignorance or disregard of the fact that the Sunset Company should not be dealt with after Buckman's bankruptcy as if it were an independent unit, Rauer kept on lending it money and collecting its accounts assigned to him, applying them indifferently to obligations before and after the bankruptcy date without regard to the rights which have been proven by the interlocutory decree to exist, of other creditors of Buckman and of the company.

It is obvious that the trustee for Buckman is not interested in any new business done by Buckman or the company, whether with Rauer or others, after the adjudication in bankruptcy on February 19, 1915. We have, first, therefore, to find the state of the account between the company and Rauer on that date. The trustee is also interested, however, in the later collection of assets of the company existing on the date of bankruptcy, and in the profitable enjoyment of any of its property. The disparity

between the parties is indicated by the fact that by the original brief, the trustee claims as due from Rauer to the company, \$23,332.75, which is increased in the supplemental brief by \$12,316.01, making a total of \$35,648.76, while Rauer on the other hand claims that there is due to him from the company, according to his first account, \$39,318.18 and according to his amended account, page 6, \$36,807.04, a sufficiently striking difference and one which illustrates the difficulties of reaching a conclusion in this matter. I may say now that the best I can do is to reach results approximately correct. [21] In this case, more than the usual one, the established practice of this Court whereby Masters' reports are first announced in draft, will be found useful in order that errors by the Master, if they exist, may be pointed out.

It is well to state at the outset that I have found it impossible to use either of defendant Rauer's accounts as a basis for the account to be taken here and correcting that basis by charging and surcharging particular items. The account covers transactions down to 1917 with which we are not concerned, in this respect, to be sure, following the terms of the decree and of the Master's order. Furthermore, both of the statements of account are vitiated by extensive omissions. I have, therefore, used the statements only as assistance and have followed the plaintiff in going to the original transactions and the evidence thereof as disclosed in the books and papers of the parties and their testimony in regard thereto. I have followed the plaintiff in taking a

so-called statement of account between the Sunset Construction Company and Rauer on March 15, 1915, something less than a month after the bankruptcy, as a starting point, stating a balance due to Rauer from the Sunset Company of \$28,874.82. This statement was made under oath by Rauer, in a petition filed in this Court in the Matter of the Bankruptcy of Buckman, for leave to foreclose a chattel mortgage. It was included, likewise under oath, in an affidavit on file in response to an order to show cause, where the matter is referred to there as an account stated. It is immaterial whether the account was stated or could be stated between Rauer and Buckman without the concurrence of the trustee and the Referee in Bankruptcy. It is sufficient that it is an admission under solemn oath. Moreover, it is corroborated in some degree by one of the Sunset Construction Company's [22] books, a little gray memorandum book kept by Fillmore Buckman, showing the number of outstanding checks not collected. It was the practice of Rauer to take evidence of his loans chiefly in the form of checks which he presented for payment when funds were on hand and often surrendered to the company in return for a new check, treating them as if they were promissory notes. On page 172 of this book is contained a list of outstanding checks marked "J. J. R." (meaning J. J. Rauer) which totals the sum of \$28,192.50, varying from the stated account by \$682.32. It is in evidence that this sum was arrived at by Rauer, Mr. Anthony, his attorney, and one or both the Buckmans after going over the

checks of Rauer and of the Sunset Construction Company. I shall, therefore, take it as a fact that on March 15, 1915, the Sunset Company owed Rauer the sum stated namely, \$28,874.82, according to Rauer's then contention. It does not follow that this result is to be finally accepted as correct.

To bring this result to the date of bankruptcy, February 15, 1915, I have gone through the cash book of the Sunset Construction Company and taken the items paid to and received from the defendant Rauer between that date and March 15th. They are as follows:

1915

Feb.	24	Paid, J. J. Rauer to D. F. Cramer for stock hire in ad- vance	\$ 200.00	
	24	Recd., J. J. Rauer.....	\$ 245.00	
Mar.	1	" " loan	30.00	
	2	" " "	200.00	
	5	Paid, J. J. Rauer ...	355.00	
	8	Recd., J. J. Rauer loan	300.00	
	8	Paid, J. J. Rauer to D. F. Cramer, for stock hire	704.96	
	8	Paid, J. J. Rauer ...	300.00	
	12	Received, J. J. Rauer, loan	75.00	
				<hr/>
		Forward	\$1559.96	850.00

Forwarded\$1559.96 \$ 850.00

1915

Mar. 12	Paid, J. J. Rauer,	
	checks taken up	
	and interest	865.00
		127.90
		15.00
15	Reed., J. J. Rauer..	175.00
15	Paid, interest on	
	\$2000.00	400.00
	Loan	175.00
	Difference in ex-	
	change in checks	69.59

Totals\$3212.45 \$1025.00

Deducting \$1025.00 received from \$3212.45 paid to him gives a balance of \$2187.45. Deducting this sum from \$28,874.82 brings the state of the account on February 19, 1915, to the sum of \$26,687.37 due Rauer on that date. This, therefore, I take as the starting point of the accounting. From this starting point I shall pass on certain claimed deductions by the trustee from this balance.

Trustee's Claimed Deduction of Interest on Debt of Said Sunset Construction Company. The date December 12, 1911, referred to in the interlocutory decree is the date of the incorporation of the Sunset Construction Company, which was in existence at the date of Buckman's bankruptcy. Prior to that, however there had been another company of the same name, likewise owned by Buckman, to whom Rauer

had loaned moneys beginning in March, 1911. It failed, apparently by inadvertance, to pay its corporation license tax to the State of California and its corporate existence was accordingly terminated by executive proclamation. The second Sunset Construction Company was then formed to continue the business. At the time of its dissolution the first Company owed Rauer something less than \$15,000.00 for which he held its note. It also owned a number of parcels of real estate, most of which were in the name of William H. Chapman, its President. The minute book of the second corporation shows that a resolution was passed by the directors authorizing [24] the issuance of ten thousand (10,000) shares of its capital stock to the directors of the first corporation as trustees in dissolution, and the assumption of all the liabilities of the first corporation in consideration of a transfer by those trustees to the second corporation of all of the assets of the first. There is no transfer of those assets in written form in evidence. Furthermore, the stock book shows that only the shares to qualify directors were ever issued. The ten thousand shares to the directors of the first corporation were made out, signed by the President, but not signed by the Secretary nor sealed with the corporate seal or ever formally issued. On March 7, 1912, Chapman conveyed to Viola Clark, a niece of Rauer, and his dummy in this transaction, by deed absolute four parcels of land, two of them twenty-five feet in frontage and two, one hundred feet in frontage, being ten lots in all. In May, 1912, Viola Clark and the Sunset Con-

struction Company joined in a mortgage of these four parcels and a fifth of one hundred feet frontage, the grantor of which lot is not clear, to John R. Stroud as mortgagee to secure the payment of \$9000.00 with interest at the rate of 7% per annum. At the same time an instrument in the nature of a defeasance was executed, which was received in evidence under the stipulation of the parties, after the conclusion of the hearing. This instrument was executed by the second Sunset Construction Company, sealed with its seal, by Viola M. Clark and by William H. Chapman. It recited that "The Sunset Construction Company is now indebted to J. J. Rauer in the sum of \$15,000 or thereabouts, on a promissory note for money loaned by the said J. J. Rauer to the said Company"; that Chapman was an endorser of said note; that the parties had on that date executed a note to Stroud for \$9000.00 and given as security a mortgage upon five parcels of land; that there were certain existing liens of \$1600.00 more or [25] less on the fifth parcel of land described in the mortgage and it was thereupon agreed that from the said sum of \$9000.00 borrowed from Stroud, the liens would first be paid and the balance paid to Rauer on account of the promissory note of \$15,000.00. The Sunset Construction Company and Chapman agreed to pay interest on the promissory note of \$9000.00. Viola M. Clark agreed to convey to Chapman, or his nominee, the said five parcels of land free and clear of all liens except said mortgage securing \$9000.00 and liens of taxes (which the first parties agreed to pay)

“Whenever the full sum of \$15,000.00 will have been paid to the said J. J. Rauer.” During the succeeding years interest on the note of \$15,000 to Rauer was regularly charged and paid by the second Sunset Construction Company to Rauer at the rate of $1\frac{1}{2}\%$ per month until a date in 1913 when the rate was raised to 2% a month. The interest on the Stroud mortgage was also paid by the Sunset Company. In addition to the security of the lots in the name of Clark, Rauer also had certain assignments of claims including one against the Taylor Estate. This latter claim was personally collected by him in July, 1915, after the bankruptcy, in the sum of \$1500.00 and is credited by him on the balance due. In December, 1915 (erroneously stated in the Amended Account as 1916) Rauer agreed with Buckman that the Company's equity in the property mortgaged was worth \$6000.00, which sum was credited on the account and is apparently acceptable to the trustee. Rauer thereupon traded the property to one, Ducas, in return for certain real estate on Fulton Street in this City, which he likewise vested in the name of another relative, Mrs. Wehrle. On this state of facts, the trustee claims that the lots were taken by Rauer in the name of Clark in settlement of the debt and not as a mortgage; and, secondly, that the agreement of the Sunset Construction Company to assume the debts of the first [26] company was without consideration since the evidence shows no transfer of assets of the first company. The trustee also relies on the fact that the deed to Clark was absolute in form

and certain testimony of Mr. Chapman on the stand that his understanding was that it was taken in full settlement. He also stated, however, that his recollection was not clear on this point and I lay no stress upon it in view of the fact that the Company for years paid interest on this debt and on the debt to Stroud. It seems to me that it sufficiently appeared that the assets of the first company were transferred to the second company and that the agreement of May, 1912, was a valid one. So far as the first company's real estate was concerned, it was in the name of Chapman, no conveyance was necessary and he acted as if the equitable interest was in the second company by conveying to Viola Clark in March, 1912, and at the same time signing an instrument acknowledging the Company's debt to Rauer. So far as the Company's equipment in the nature of grading machinery was concerned, this could be transferred by manual delivery and, in fact, must have continued as before under the control and management of Buckman. As a matter of fact, the same evidence which induced Judge Van Fleet to hold that the second company was merely a dummy corporation, of Buckman himself, would induce to the same conclusion as regards the first Sunset Company. The claim of the trustee as regards this matter takes practical form in a demand that there should be deducted from the balance due as stated, all the interest which was paid to Rauer on the \$15,000.00 note and to Stroud on the \$9000.00 note, amounting in all to \$16,024.38 for principal and interest items.

For the reasons given, this deduction will be denied.
[27]

Deduction of \$7500.00. As stated above, it is admitted by all parties that the Sunset Company's equity in the lots mortgaged to Viola Clark for Rauer was, after bankruptcy, liquidated at \$6000.00, and the assignment of claim against the Taylor Estate was paid in the sum of \$1500.00. This total sum of \$7500.00 is, of course, not represented in the account stated as of March 15, 1915, or in the figured balance of February 19, 1915. Deduction for \$7500.00 must, therefore, be allowed.

Usurious Interest. It is in evidence that Rauer charged the Sunset Construction Company interest at the rate of $11\frac{1}{2}\%$ per month up to March 11, 1913, and thereafter interest at the rate of 2% per month. In addition to that whenever a loan was made it was his custom to charge them what he called a "discount" which was nothing more nor less than a bonus or extra compensation for making the loan. Furthermore, since his practice was, in determining the amount of the new checks, to include unpaid items of interest and discount as well as principal, there resulted a compounding of interest, the amount of which, however, cannot be determined. The trustee refers to the California Statute entitled "An Act to Define Personal Property Brokers and Regulate their Charge and Business" approved April 16, 1909, Amended in 1911. In brief, this bill defines a personal property broker as one who takes as security for a loan any chattel mortgage, or who engages in the business of loaning money, taking as security therefor any lien on or

assignment of wages, salary, income or commissions. The defendant's reply is devoted to a denial of the trustee's claim that Rauer's business was within the Act. I have no question that he was a personal property broker as defined in the Statute. It sufficiently appeared in the evidence [28] that he was engaged in lending money to others as well as to the Sunset Construction Company. It also appears that during all this period he took assignments from that Company of contracts for grading work and of moneys to become due thereunder. It seems to me that such assignments covered "income" as mentioned in the Act.

The trustee points out (Opening Brief, page 15 and following) that the rate of interest charged, exclusive of discount charges was $1\frac{1}{2}\%$ per month to March 11, 1913, and thereafter at the rate of 2% per month; that prior to June 3, 1913, when an account was opened by the Company with the Merchants National Bank, there is no way aside from Rauer's admissions of segregating the interest charges from the principal sums, but that commencing with that date down to February 19, 1915, the date of bankruptcy, separate checks were drawn and cashed for interest, none of which checks included either principal or discount. He then shows by a list of the checks that at least the sum of \$12,279.65 was paid to Rauer on the admitted interest account after June 3, 1913. The brief says: "The foregoing statement shows that the Sunset Construction Company paid Rauer at the rate of about

\$600.00 per month on the sum of all outstanding loans. Moreover, it shows conclusively that Rauer received during the period commencing June 3, 1913, far more than the 2% per month admitted by him." He also submits a list of discounts shown on the face of the account, amounting to \$1493.50, and also a list of additional discounts in the sum of \$1462.00, which, however, by subsequent stipulation, was cut in half at \$731.00. He then comments on compounding of interest without drawing any specific results therefrom. His conclusion is that since by the statute loans by a personal property broker whereby more than 2% per month is charged are declared not valid, it is open to the Court in this [29] accounting to reduce the rate of interest to 7% per annum under Section 1917 of the California Civil Code fixing that rate where there is not "An express contract in writing fixing a definite rate." By a computation shown on pages 2 and 3 of the original Closing Brief, after making allowances for interest otherwise deducted, the trustee takes seventeen twenty-fourths of the result, thus allowing 7% and reaches a final claimed reduction of \$8806.05.

I find myself unable to agree with the trustee either in his conclusion as to the effect of the Statute or in his claim that there is a demonstrated usury on the facts stated. The statement that a total sum of \$12,279.65 demonstrates on its face that it represents more than 2% per month does not seem to me to be self-evident for the obvious reason

that in the method adopted, by me, following the plaintiff of stating this account by deductions from a later admitted correct account, I cannot know the balance due at any particular time during the period after June 3, 1913. Whether any individual payment of interest or a total for a period is usurious depends, of course, on the amount of the principal upon which the payment is made. Furthermore, I do not agree that the Statute warrants us in reducing the rate of interest to 7% per year. Section 4 of the Act approved April 16, 1909, as amended April 21, 1911, reads as follows:

“No contract of any kind or nature made by any personal property broker which comes within the scope of business as set forth in Section 1 hereof, or which in any way involves any security given to secure the performance of such contract, shall be valid or of any force, virtue or effect, either at law or in equity, if there is therein or thereon directly or indirectly charged, accepted or contracted to be received or paid, either in moneys, goods, discount, or thing in action, or in any other way, a greater benefit, rate of discount, or interest than the rate of two per centum per month; and if a greater benefit, rate of discount [30] or interest than two per centum per month is directly or indirectly advanced or paid upon any such contract as is in this section designated, the excess above the said rate of two per centum per month so advanced or paid may be demanded and recovered by the

person or his legal representatives or assigns who advanced or paid the same from the person or corporation either to whom or for whose use or benefit such payment or advance or any part thereof was made."

To my mind this means, first, that as to any executory contracts where it is proved, as it doubtless could readily be proved in most of the instances of loans by Rauer to the company, that a discount or bonus was paid in addition to the stipulated rate of 2%, the contract of loan would be invalid and Rauer could not recover. Where, however, as here, the transaction has been executed and the excess over 2% per month has been paid, the remedy is that the excess can either be recovered back by action under Section 4, or deducted in an accounting proceeding such as the present. In other words, the Statute makes 2% a month the legal charge in such cases as this, refuses to enforce an executory contract for a greater rate, and when executed gives a remedy for the excess. Such transactions as this are full of risk and to my mind would plainly not be compensated by an allowance of 7% per annum and the Statute so recognizes. I conclude that Section 1917 of the Civil Code does not apply and that I must credit the trustee only with the proved excess over 2% a month. It is not evident to me, as I have stated, that any part of the \$12,279.65 constitutes an excess over 2% a month and the only excess that is allowable is made

up of the items of discount or bonus paid while the 2% rate was in effect. These are the items of

April 1, 1913.....	\$111.00
June 3, 1913.....	15.00
Sept. 5, 1913.....	40.00

Total.....\$166.00

plus the stipulated discounts of \$731.00, or a total of \$897.00. [31] The latter sum will be deducted.

Deduction of \$1440.00 and Interest. This represents a plain bookkeeping error by Rauer, which I will not discuss fully, as it is fully and adequately explained in the plaintiff's brief. Rauer received and collected certain demands against the City, charged them twice and credited the same only once. The interest on this amount from July 20, 1913, to March 16, 1915, was paid in the amount of \$561.60. Interest to February 19, 1915, would be \$547.20. In my calculation above which was roughly adapted to bring the balance stated on March 15, 1915, to February 19, 1915, I did not include interest items and the former figure should therefore be used here. Deduction will be allowed, therefore, in the sum of \$2001.60.

The matters remaining grow out of transactions between the Sunset Construction Company and Rauer subsequent to the date of Buckman's bankruptcy, February 19, 1915. As I have stated, that company continued doing business and its relations with Bauer continued exactly as if no bankruptcy of Buckman had occurred. Collections were made upon contracts completed before bankruptcy.

Some of the money was either collected by or immediately turned over to Rauer. The moneys received were applied by him not only for current interest, but in cancellation of loans and the application was indifferently made to loans prior to the bankruptcy date and to loans subsequent thereto. The grading equipment of the company, upon which Rauer had a chattel mortgage not legally foreclosed until December 7, 1916, was sometimes used by Rauer himself, sometimes rented to others and the rent collected by Rauer, and sometimes used by the Sunset Construction Company on contracts assigned to Rauer. In [32] disposing of these matters I have followed the following principles which seem to me to represent good law:

1. Any money due the Sunset Construction Company on February 19, 1915, which can be traced into the hands of Rauer whether applied by him on indebtedness prior to bankruptcy date or subsequent thereto have been charged to him in reduction of the indebtedness at the date of bankruptcy;

2. Where collections were made by Rauer after bankruptcy and applied in reduction of indebtedness prior to the bankruptcy, I have followed his application of funds and have reduced the account as stated on February 19th by that amount. If those moneys were subsequently arising assets of the Sunset Construction Company, it is Rauer's misfortune that he applied them on prior debts. The funds have been so mixed by him and there are so many items of doubt and so much in the

evidence to show that more of the prior assets of the Company have been received by Rauer than can be here traced that I have felt justified in assuming that his application of collections in satisfaction of checks dated prior to bankruptcy and held by him is to be followed as a correct application of the proceeds;

3. Rentals collected or earned for use of the mortgaged equipment have been charged against Rauer for reasons hereafter more fully explained.

Collection of \$8040.60 on account of Fourteenth Avenue paving. On page 10 of the credit items in Rauer's original statement of account, Exhibit 1 herein, will be found a list of collections in 1915 and 1916 made by Rauer on account of a contract concerning Fourteenth Avenue between A, B and C Streets, the total amount of which [33] is \$8040.60. As regards this money Rauer's position is that it represented a paving job done after bankruptcy. The trustee's position is that it represented a grading job completed by the company before bankruptcy. There is no question that the grading job was completed before bankruptcy, its final acceptance by the Board of Public Works occurring on January 22, 1915. On that date the voucher book of the company shows that bills were sent out to various persons aggregating in amount \$6712.80 (the trustee's brief erroneously states this amount at \$5293.80, omitting a bill sent to Hyman, voucher 2239, in the sum of \$1419.00). The trustee says that the names on the bills coincide substantially with the names on page 10 of the

account and he concludes that the entire collections for this grading work have been traced into Rauer's hands. At the expenditure of considerable labor, I have traced this matter through the cash books, the so-called "black" book and the gray book of the Sunset Company and I find that the trustee's conclusion has been too readily reached in accordance with his wishes. A number of these bills were collected by the Sunset Company before the bankruptcy and the checks therefor either cashed, deposited to their account or transferred to persons other than Rauer. There follow the payments for grading proved to have been received by Rauer and applications of money whether for grading or for the subsequent paving made by him on account of obligations prior to bankruptcy.

On February 10, 1915, there was due and collected by Rauer two warrants on the city and county of San Francisco in the total amount of \$990.00 for which he surrendered checks of the Sunset Construction Company, unpaid, of dates prior to the bankruptcy. This credit is not shown in Rauer's account.

On March 11, 1915, the cash book and the black book show [34] that Rauer collected other bills against the city and county for grading Fourteenth Avenue in the sum of \$495.00 and applied this, together with other collections, the date of whose origin with reference to the date of bankruptcy is not shown, in taking up checks of the Company dated both before and after bankruptcy. I there-

fore charge him with the amount of the application to prior checks, a total of \$665.00.

On May 20, 1915, check in payment of a bill against one, Webb, one of the bills above mentioned for grading, was received and endorsed to Rauer in the sum of \$137.50. I charge this collection to him.

On May 31st, check of Hyman for \$750.00; on May 24th, check of the same person for \$250.00 were endorsed to Rauer and applied in payment of checks issued after bankruptcy. The testimony of Hyman and a receipt in evidence show that Rauer also received from Hyman on June 4, 1915, a payment of \$500.00 on account of this grading contract which is not shown either on the books of the Sunset Company or on Rauer's account. I charge him accordingly with \$1500.00 thus received from Hyman.

On May 25, 1915, a check from Dufau for grading Sunset Avenue in the amount of \$20.00, check of Rider for \$306.70 and check of Meyer for \$3148.04 were turned over to Rauer. The Dufau check, as stated was for grading. It is possible that part of the Rider check was for grading, although not certain, and likely that part of the Meyer check was for grading done prior to bankruptcy. In return for this money Rauer extinguished obligations by a surrender of checks dated prior to February 19, 1915, in the total amount of \$2830.50 and I charge this sum to him in accordance with the principle stated. On May 22, 1915, the Sunset Construction Company transferred to Rauer [35] a check from Sol Getz & Sons described as "Account 14th Avenue" in the amount of \$1043.36. Getz is not among the persons to whom grading bills appear to

have been sent. I do not know whether the bills cover work done before or after bankruptcy. Rauer, however, surrendered one check in the sum of \$400.00 dated prior to bankruptcy along with others subsequent thereto and I accordingly charge him this sum of \$400.00. On June 3, 1915, the Sunset Company transferred to Rauer a check from Getz for \$521.38, one to E. Jordan, \$83.75 and one from Gardizer for \$160.00, against which Rauer cancelled checks issued prior to bankruptcy in the total amount of \$800.00. I accordingly charge him this amount.

The total of deductions, therefore, which I make in connection with the trustee's claim that this amount of \$8040.60 should be charged against Rauer amounts to \$7323.00.

Claimed Deduction of \$2624.25. The trustee lists these items on page 4 of the appendix to the Final Brief as collections subsequent to bankruptcy admitted on the face of Rauer's account. They are taken from pages 5 and 6 of the Amended Account and consist of the following:

1915.

July 5	C. Sutro.....	\$320.00
Dec.	J. D. Welch.....	100.00

1916.

Jan. 29	Profit balance on contract Lawton & 45th.....	422.50
July 19	Profit balance on Whittell contract	568.05
July 3	Profit balance on contract with Carolán	182.95
Jan. 31	Profit balance on McKenzie con- tract	219.50 219.50

1915.

July 9	Reese	150.00
July 12	Gessler	81.25
July 31	Phillips	600.00

[36]

There is no question but what these collections are admitted by Rauer, but there is nothing in the evidence known to me to prove that they arose prior to bankruptcy. Obviously if Buckman or the Sunset Construction Company did work for Sutro, Welch or the other individuals after bankruptcy, it would be shown in the Rauer statements of account since they cover the period subsequent to the bankruptcy, but they do not constitute an admission that they concerned business of the Sunset Company prior to the date of bankruptcy. So far as the contracts are concerned, it is true that large contracts existed with Carolan, for instance, and maybe with the others, prior to the bankruptcy but work was also done subsequent to the bankruptcy. There is nothing before me to show that any of this money applies to the pre-bankruptcy period. If they were unfinished contracts, the trustee had an election to be exercised within a reasonable time, whether he would complete the work or not. Since the election was not made until long after the contracts were completed, I do not feel inclined to assume that the election would have been made and I see no reason in the present state of the proof why these profits should be allowed to the trustee. The deduction claimed of \$2624.25 is, accordingly, denied.

Miscellaneous Collections. The briefs disclose several small collections shown on the face of

Rauer's account, which I conclude were assets of the Sunset Construction Company on the date of bankruptcy and charge them against Rauer without extended discussion, as follows: [37]

Academy of Sciences.....	\$ 300.00
Reeder & Foster	407.20
Bosworth	500.00
Iverson	500.00

\$1707.20

RENTAL OF EQUIPMENT FOR TARAVAL STREET CONTRACT.

This was a job of grading in March, 1916, done by Rauer on his own account, upon which certain equipment belonging to the Sunset Construction company was used. This brings up the question of the chattel mortgage on the equipment given to Rauer by the company in June, 1914, to secure a note for \$5000.00 and future advances. There will be found in the briefs a great deal of discussion of the law and the facts, much of which seems to me unnecessary. The chattel mortgage is in evidence and covers certain named equipment and any other personal property of the company. It was accompanied by the necessary affidavits and was recorded. It contained a clause allowing the mortgagee to take possession after default. The notes were payable on demand and since there was a continuing balance of indebtedness, it is probable that default occurred at an early date. Rauer took possession of the equipment for use on the Taraval Street job as early as March, 1916. The chattel mortgage in question and the accompanying notes were made to H. Wehrle, a brother-in-law and dummy of Rauer.

On July 22, 1916, a complaint was filed in the State Court whether in claim and delivery or foreclosure, is uncertain. The certified copy of the decree entered by consent on the day after the filing of the complaint recites promissory notes in the sum of \$15,000.00, the giving of the chattel mortgage, the delivery of the property under mortgage to the plaintiff in the interval between the filing of the suit and the decree on the following day, the present indebtedness on the notes in the sum of \$10,000.00 and that the personal property secured by the mortgage was of the value [38] of \$7500.00. Then follows a decree "That the plaintiff have, recover and retain the possession of all the above-described personal property and that the defendants be credited the sum of \$10,000.00 on the \$15,000.00 secured by said chattel mortgage, leaving a balance in favor of the plaintiff in the sum of \$2500.00." The ambiguity in the decree as to the balance due is obvious, but it would appear that it was intended to recite that \$5000.00 had been paid on the notes prior to suit and that the property was taken in for \$7500.00, leaving a balance of \$2500.00. The trustee in bankruptcy was not joined. In August Rauer exercised dominion over the property by giving Buckman an option to purchase the property at a stated figure by the application of rents for the use of it. In September, 1916, the interlocutory decree in the present case was granted virtually setting aside the sale in the Superior Court by decreeing that all the property of the Sunset Construction Company was the property of Buckman and had vested in his trustee in bankruptcy. Thereafter Rauer filed his petition in this Court in bankruptcy, asking leave to fore-

close the chattel mortgage. It was foreclosed and on December 7, 1916, the property was sold to another admitted dummy of Rauer for the sum of \$3701.60 and the money impounded in Court.

Since the mortgage provided that the mortgagee might take possession, Rauer was entitled to do so at any time after default.

CIVIL CODE 2927.

Such a taking of possession would not, however, foreclose the mortgagor's right of redemption. Neither did it entitle Rauer as the mortgagee to collect any rentals upon the mortgaged property or to make use of it for his own benefit.

First National Bank vs. Erreca, 116 Cal. 81.
[39]

Any possession he might take was only for his further security. Rentals collected by the mortgagee during his possession, however acquired, and the value of the use of equipment by him on his own work is, therefore, chargeable against him in favor of the mortgagor and the trustee in bankruptcy. Counsel for Rauer makes claim for certain expenditures upon the equipment. These are denied for two reasons: First, expenditures for the benefit of mortgaged property will not be allowed where the holding of the mortgagee is adverse to the mortgagor as is here evidenced by the option given to Buckman; and second, for the reason that the proof is indefinite as to the time of the expenditures and the total amount thereof.

The trustee claims that the rental value of this equipment on the Taraval Street job was \$475.00 per month and that its use was from March until

January of the following year. The evidence seems to show that while the final acceptance of the work did not take place until January, the equipment was taken off the job after three and one-half months' use. From what the evidence shows as to the equipment in use and the rental value thereof, I find that a reasonable rental would be \$375.00 a month for a period of three and one-half months, or a total of \$1313.50, which will be charged against Rauer in favor of the trustee.

Miscellaneous Collections of Rent. Rauer collected rental for the use of this grading equipment by others as follows:

Hutton, included in statement of account,	
under date Aug. 1916.....	\$ 927.00
Items, not included in account, but shown	
in statement of account rendered	
Buckman	1300.00
Rent from Morgan Improvement Co.....	159.13
Scrap iron sold.....	75.00
	<hr/>
	\$2461.13

[40]

Trustee's Claim for Reasonable Rental Value Between July 1 and December 1, 1916. The Trustee claims that he should be allowed \$3867.37 for reasonable rental value of the equipment between July 1, 1916 and December 1, 1916. He claims that the total rental value of the equipment during this period from the evidence was \$7251.50, from which he deducts the amount claimed by him for use on the Taraval Street job and the amounts of rentals collected from Hutton and others. The theory of this

claim is that whether the property was in fact used or not, Rauer having taken possession must account for the value of its use. It seems to me that the cases cited by the trustee may be distinguished on the ground that the possession taken was unlawful. Here Rauer had a right to take possession for his security, but not to use the equipment. If his possession was lawful, I see no reason why he could not store it unused. The claim for reasonable rental value is denied.

Claim of the Trustee Arising from Contract With the Federal Construction Company. The facts under this matter are briefly as follows: About December, 1914, being thus before the bankruptcy of Buckman, certain oral contracts were entered into between the Sunset Construction Company and the Federal Construction Company, three in number. The principal one concerned some work on San Bruno Avenue; the other two were minor jobs for street work on Twenty-first Avenue and on "B" Street. All of these contracts had been let by the city to the Federal Construction Company. On the San Bruno job the terms of the arrangement between the two companies were that the Sunset was to furnish the necessary equipment and the superintendence of Buckman and the Federal was to furnish the necessary money. The profits, if any, were to be divided equally and losses, if any, were to be borne by the Federal Construction Company. Similar arrangements [41] were made as to the minor jobs excepting that the Sunset Company was to have 40% of the profits and bear 40% of the losses. The San Bruno Avenue job was begun

about March or April, 1915, and was completed in January, 1916. Officials of the Federal Construction Company testified that Buckman's superintendence was only nominal so that the Federal had to send out its own superintendent on the job and that all the necessary equipment was not furnished by the Sunset since the Federal had to hire a steam shovel. Difficulties arose as to a settlement under the contract and there are in evidence stop notices filed by Rauer, to whom the Sunset contract had been assigned in June, 1916, with the Auditor of the City and County of San Francisco. One of these stop notices contained the following language: "The claim of \$12,000 is for the foregoing rental, use and consumption of equipment and material used in the grading and sewerage of San Bruno Avenue between Oakdale Avenue and Galvin Street." Nothing is said about Buckman's services as superintendent. On or about August 12, 1916, a settlement was had between Rauer and Buckman on the one side and the Federal Construction Company on the other. This settlement is represented in Rauer's statement of account by the item "August 12, 1916, J. Dowling, \$8409.80." Dowling was the president of the Federal Construction Company. In the opening brief, the trustee's claim against Rauer in connection with this subject matter was confined to this sum of \$8409.80. The supplemental hearing produced further evidence and the trustee makes claim in additional amounts increasing his claim to \$10,828.31.

The trustee claims that Rauer must account for any moneys traced to his hands. It seems to me

that the trustee's [42] position must be upheld on either one of the following theories:

(1) An executory contract of the Sunset Company in existence at the date of bankruptcy, which was in its nature transferable (and this was transferable since it was later assigned to Rauer) must be held to be one which the trustee had an election to adopt within a reasonable time. It was, however, a concealed asset which no amount of diligence on the trustee's part would discover and it was not discovered until this accounting, long after the contract had been completed and settlements made. It was a contract which the trustee in bankruptcy would readily have adopted upon notice of it, since it involved no expenditures by him and no possibility of loss. Rauer's counsel objects that Buckman was not compelled to give his services after bankruptcy to the trustee and that the value of those services rightfully belonged to Buckman and were assignable by him to Rauer. The answer to this is that we do not know whether Buckman would have given his services if the trustee had adopted this contract, since both Buckman and Rauer concealed the facts; and, furthermore, the terms of the assignment are not in evidence. The effect of this, like other transactions where Rauer made collections of the Sunset Company's assets, was that he thus secured a preference over other creditors existing at the date of bankruptcy.

The second theory upon which the trustee's demand for these moneys seems to be justified, has relation to what has been said heretofore about the rental for the use of the Company's equipment.

This was a contract in which the consideration given by the Sunset Company was its equipment and Buckman's services. If the evidence in this case had shown the reasonable value of [43] Buckman's services, it would be possible to consider whether such an amount ought not to be deducted from the moneys received by Rauer. There is no such evidence that I have discovered. It is in evidence that at the same time he was doing other work. (Transcript, 485.) It is also to be considered that the withhold notice makes no mention of the services as part of the foundation of the claim. There is thus a confusion of moneys which it was incumbent upon Rauer to resolve to my satisfaction by evidence. In the absence of such evidence, no credit will be given for the value of Buckman's services.

It will be impossible to detail in this report all the figures in the computation which I have made. I refer to the transcript of the final account concerning the settlement, taken from the books of the Federal Construction Company headed "A.E.B.," to page 21 of the supplemental brief of Rauer's counsel, to the transcript of the journal entries in the books of the Federal Construction Company. From these sources and from the testimony, together with Rauer's statements in evidence, reinforced by the concessions of the defendant's counsel as to amounts received by Rauer, and concessions by the trustee's counsel as to amounts for which he should *received* credit, I have reached my results.

I may say that the trustee's counsel is not entirely clear as to the manner in which the figure above

referred to of \$8409.80 is reached. This appears on page 5 of the credits in Exhibit 1 in the following entry:

“August 12, 1916, J. Dowling, \$8409.80.”

The detail of this given in the transcript from Rauer's ledger, page 66, at an unnamed date after July 3, 1916, is as follows: [44]

Dowling, etc. \$7139.62; unpaid Asst. 21 & 22 & B, \$1145.18; Anthony, \$125.00. The total of these items is \$8409.80. The transcript of the ledger of the Federal Construction Company shows that the first item was a check made on August 12, 1916, described as “Cash in full J. J. Rauer of all account.” The \$125.00 item was a bill against Anthony for street work done by the Federal Company, assigned to Rauer in lieu of cash. The item of \$1145.18 refers either to unpaid assessments or unpaid assignments of account similar to the above for street work on the streets named, made by the Federal Company to Rauer. The sum is made up of the following items shown on the ledger sheet of the Federal Construction Company:

1916

Sept. 29	Amount collected by Rauer	
	from Seashore Realty Com-	
	pany	\$544.50

1917

April 14	Cash, J. J. Rauer.....	292.05
April 30	Josephine Dillon account as-	
	signed to S. C. Co. and J. J. R.	287.75
30	Diff. of acct.....	20.88

\$1145.18

Rauer says that as part of the settlement, he took bills for collection, some of which were collected and some were not and were returned to the Federal Company. The ledger account discloses that on September 29, 1916, he collected \$544.50 and that in April, 1917, being the date apparently when unsuccessful collections were returned, he took a collection against Dillon as cash and credited the item of \$292.05 and since he acknowledges a credit in full, what must be deemed a cash item of \$20.88 to settle the transaction. In other words, the trustee's error is that he charges the item of \$292.05 against Rauer twice and does not [45] charge the item of \$20.88.

The transcript of the ledger sheet of the Federal Construction Company headed "A. E. Buckman" concerning these three jobs shows on the credit side an item of cash paid by Rauer, rental for cars used by the Federal on still another job, *pro rata* shares of profit on two of the jobs, charges against the Federal for team hire paid by Rauer in part on the San Bruno job and in part on other jobs, and other bookkeeping entries; on the debit side it shows that the account was balanced in part by payments to the Sunset Company, in part by charges against that Company for paving work on Fourteenth Avenue and other charges, in part by payments to Rauer and in part by assignments of claims against others made to Rauer and collected by him.

Rauer's counsel, page 21 of his supplemental brief acknowledges receipt by Rauer from the Federal Construction Company, including the Fourteenth

Avenue paving and numerous other items, in the total amount of \$17,216.49. I take these concessions as a starting point. In addition, he must be charged with the receipt of the following items shown in the transcript of the Federal's ledger sheet:

1915

Nov. 20	Cash to Sunset Construction Company	\$150.00
Nov. 30	Cash to Sunset Construction Company	200.00
Dec. 22	Cash to Sunset Construction Company	250.00

1916

Jan. 22	Cash to Sunset Construction Company	\$300.00
Apr. 8	Cash to Sunset Construction Company and J. J. Rauer.....	250.00
Apr. 30	.....	20.88
	Total	\$1170.88
	Adding the	17216.49

Total received by Rauer.....\$18387.37

[46]

Receipt of the items omitted by counsel had already been admitted by the statement of account, Exhibit 1; for the first five items named, see page 3 of the credits and \$30.88 is part of the total of \$8409.80 shown on page 5 of the credits.

The trustee's closing supplemental brief, page 22, admits the following are proper credits to Rauer:

Cash	\$2,000.00
Overcharge Joseph Estate (book- keeping entry)	205.52
Teaming	5,190.45
Allowance to Buckman.....	188.60
Allowance to Buckman.....	91.40
<hr/>	
	\$7,675.97

It appears to me plain that counsel for everybody have conceded too much. From the figure of \$17,216.40 conceded by Rauer's counsel to have been received by him, there should be deducted the item of \$227.81, the *pro rata* share of loss on Twenty-first Avenue, which was not a cash receipt but an offset to profits on the other jobs. Deducting this from the figure of \$18,387.37, to which I have increased the amount chargeable against Rauer, gives us a final figure of \$18,159.56, chargeable against Rauer in favor of the trustee. On the other hand, the trustee has included in his allowances of credit to Rauer, two items of \$188.60 and \$91.40, total \$280.00, which appear from the ledger sheet to have been allowances made to Buckman to be credited against the charges of \$2212.78 for checks or otherwise paid to him by the Federal. The net credit to Rauer should therefore be \$7395.97 instead of \$7675.97. Deducting \$7395.97 from the \$18,159.56, we have a balance of \$10,763.59, for which Rauer must be charged in this account. [47]

Deduction of \$3701.60 Paid into Court on Foreclosure of Chattel Mortgage. As stated above, Rauer petitioned the Referee in Bankruptcy in the Matter of the Estate of Buckman, Bankrupt, for an order of sale of the property secured by the chattel mortgage given to Wehrle in his behalf, and that upon the sale, the money paid be impounded to await the disposition thereof by the Court. On December 7, 1907, the mortgaged property was sold to a dummy of Rauer for \$3701.60 (Transcript, 503) and the money was advanced by Rauer and was impounded as prayed. It is Rauer's claim, of course, that the debt for which the chattel mortgage was security had not been paid and that the money should be turned over to him. The trustee, on the other hand charges Rauer with this sum, the amount being stated in error at \$3706.00 (see appendix, page 4, to original final brief).

It is not clear to me why this sum should be charged to him nor why this transaction should enter into this accounting in any manner. If the final result of this accounting should show a balance due to Rauer on some claim filed against the Estate of Buckman and if the Referee should determine that it is preferred, he doubtless will order the impounded money paid to Rauer. If, on the other hand, the result of this accounting should show a balance due to the trustee, then it will likewise follow that Rauer's claim against the estate, preferred or otherwise, will be denied and the money retained as general assets of the Estate in Bankruptcy. In other words, the disposition of the impounded

money seems to me to be a matter for the Bankruptcy Court, guided of course, by the action of this Court upon the Master's report on this accounting.

There are many questions discussed in the briefs which [48] I have not thought it necessary to comment upon and claims on both sides which I have disapproved without comment, in the interest of brevity. It may be, however, that unintentional omissions or mistakes have been made and these should be called to my attention on objections to the report when announced in draft.

SUMMARY.

Admitted amount due Rauer March 13,	
1915	\$28,874.82
Deductions to determine amount due	
February 19, 1915, <i>supra</i> , page 8....	2,187.45
	<hr/>
Statement revised to February 19, 1915..	\$26,687.37
	<hr/>
	<hr/>

Deductions herein made in favor of Trustee as follows:

Admitted credits on mortgage, <i>supra</i> ,	
page 12	\$ 7,500.00
Excessive interest, <i>supra</i> , page 15.....	897.00
Erroneous charge of \$1440.00 and interest, <i>supra</i> , page 16.....	2,001.60
Collections by Rauer a/c 14th Avenue,	
etc., <i>supra</i> , page 20.....	7,323.00
Miscellaneous collections of assets, <i>supra</i> ,	
page 722	1,707.20

Equipment rental Taraval Street, <i>supra</i> , page 24	1,312.50
Equipment rental collected from others, <i>supra</i> , page 24	2,461.13
Federal Construction Company matter...	10,763.59
	<hr/>
Total deductions	\$33,966.02
	<hr/>
Statement of Rauer, February 19, 1915..	\$26,687.37
Balance due Trustee.....	7,278.65
	<hr/>
	\$33,966.02

[49]

For the foregoing reasons, I find there is now due from defendant J. J. Rauer to the Trustee in Bankruptcy, the sum of \$7,278.65.

And I conclude that the plaintiff herein should have the decree of this Court that all unpaid checks drawn by the Sunset Construction Company in favor of J. J. Rauer and all promissory notes of said company in favor of said Rauer or any other person as his trustee, if now in evidence in this case, be canceled as paid and that any such checks or notes not in evidence but still held by said Rauer as evidence of claimed indebtedness, be ordered delivered up to be canceled. That the plaintiff, the said trustee, have the decree of this Court directing said J. J. Rauer to pay the said trustee the sum of \$7,278.65, together with interest thereon from the date of the Master's final report herein

until paid at the rate of seven (7%) per cent per annum, and costs of suit.

Dated June 16, 1921.

H. M. WRIGHT,
Sp. Master. [50]

Supplemental Report.

On June 16, 1921, the foregoing report was announced in draft and the parties were given until July 6, 1921, within which to present their objections thereto. This time was subsequently extended to include July 23, 1921, and on the last mentioned date the parties were heard in brief argument as to certain matters contained in the objections. On July 15, 1921, the defendant, Rauer, filed objections, which are herewith separately returned. On July 23, 1921, plaintiff likewise filed objections, herewith separately returned.

The objections disclosed defects in the report that were not unanticipated in view of the difficulty in ascertaining the facts and in disposing of them, to which I have referred in the draft report. Before my consideration was finished, however, Messrs. Grant & Zimdars appeared as additional counsel for defendant Rauer, and left with me a document entitled "Observations Upon Master's Report" to which was annexed a report by Haskins & Sells, Certified Accountants, this document really being additional objections to the report, and asked leave to file it. Counsel for the plaintiff as well as counsel for defendant Rauer were called in to attend

me on August 27, 1921, for hearing as to whether the additional matter should be received. Counsel for the trustee did not object and it was accordingly ordered that the so-called observations be received as additional objections to the report. At the same time the parties were heard in oral argument, the burden of which on the part of defendant Rauer was that throughout the proceedings under the order of reference, the interlocutory decree had been misunderstood and the accounting made and decided under a misapprehension that was vital. Counsel for the Trustee asked leave to brief the matter and, [51] accordingly briefs were filed by the plaintiff on October 14, 1921, by defendant Rauer in reply on October 31, 1921, and by the Trustee on November 10, 1921. These briefs are also separately returned.

I consider first, the point made as to the interpretation of the decree. The defendant contends that the pleadings, the evidence and the decree show that the whole suit concerned the shares of stock of the Sunset Construction Company pledged to Rauer, the pledge being declared void and the property in the stock remaining in Buckman and, by his bankruptcy, passing to the Trustee on February 19, 1915. The accounting ordered between Rauer and others on the one hand, and the company on the other hand, would be useful and was needed to determine whether the shares had value. But, it was urged, since it was Buckman who was declared bankrupt and since the Sunset Construction was never declared bankrupt, the date of bank-

ruptcy had no significance. It must be borne in mind that the theory upon which the accounting had proceeded was that any intermeddling by Rauer with assets of the Company after the date of Buckman's bankruptcy was unauthorized, that he must account for all collections or profits from its assets and be allowed none of its debts to him due to continued business relations after the date of bankruptcy. It is apparent that the point was a serious one, since if his contention was true, it might well be that by including subsequent transactions by way of payments and receipts, it would appear that nothing was due from Rauer, but on the contrary, a sum approximating the sum claimed in his statements of account in evidence was due to Rauer. I think that if the interlocutory decree had been read at the time of the argument, no further discussion would have been necessary. The parties are aware that the terms of the decree embodying [52] the order of reference furnishes the chart of the Master's authority. It is not for the Master to review the proceedings as on a bill of review or as on an appeal. If there is error, it is not for me to correct.

Briefing the interlocutory decree, it provides in Paragraph 1 that A. E. Buckman was on February 19, 1915, the date of bankruptcy, the owner of all the issued stock of the Sunset Construction Company, that on that date it passed to his Trustee in bankruptcy. The second paragraph provides that at all times and on February 19, 1915, he was "The owner of the Sunset Construction Company, a corporation, and of all the property, books and records

of said Company.” That on the day mentioned, “The Company, the property, books and records vested in and became and now are the property” of the Trustee. The third paragraph provides that Rauer and others account for all moneys or property received by them from or advanced by them to the company since December 12, 1911 “For the purpose of determining what claims if any exist between said company and said persons.”

Now it is obvious that the phrasing of the decree was open to criticism in making an individual the owner of a corporation. It is also obvious that there is an inconsistency between Paragraphs 1 and 2 in speaking of Buckman as the owner of the issued stock of a corporation and at the same time of the corporation itself and of its property. Nevertheless, it is necessary for me to obey the decree in its most inclusive form, which is the form embodied in the second paragraph declaring the Trustee the owner of the property of the company.

Counsel for Rauer have made a striking argument by referring to Paragraphs 1 and 3 of the interlocutory decree and utterly neglecting, or at least glossing over, Paragraph 2. They likewise [53] misstated the bill of complaint in saying that it only concerned the ownership of the pledged stock, when it also alleges, rather inartistically to be sure, that the company was merely an embodiment of Buckman and that it was necessary that its assets be realized on for the benefit of Buckman's creditors. It is true that the terms of the third paragraph, directing the accounting of transactions

between *the company and Rauer* can be more readily related to Paragraph 1, declaring the Trustee the owner of the stock in the company, but it is also true that these terms can, without undue violence, be related to Paragraph 2, declaring the Trustee the owner of the company and of its property.

I conclude, therefore, that the reference thus far has been on no mistaken theory, and that Rauer must account to this Trustee for dealings with the company's assets owned on February 19, 1915, after that date, without the benefit of offsets' subsequently accruing. There are, of course, difficulties arising out of the fact that the company was never declared a bankrupt, that its creditors have not been scheduled and notified to file their claims and that defendant Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the company after Buckman's bankruptcy as a separate entity not affected by his bankruptcy. These, however, are matters that concern the correctness of the interlocutory decree only, and so far as Rauer is concerned I shall hereafter embody a recommendation that he be allowed to prove his claim herein.

I consider first the objections of defendant Rauer: The objections originally filed contained 42 pages of typewriting and offended against the rule that objections should be clear and specific in pointing out the matters relied on. The document constitutes [54] an argument and evinces considerable misapprehension of what the report means and

of the evidence that I have before me. Certain misapprehensions of counsel should be corrected. They claim, for example, that I have not followed the directions in the order of reference in that I have not adopted the Rauer accounting in Exhibit 1 and Exhibit 3. I have returned these as part of the evidence, but I have not adopted them for several reasons. One reason was that they amount to a statement of transactions from the beginning of dealings between Rauer and the Sunset Construction Company to the end, long after the bankruptcy of Buckman. The conclusion of Exhibit 3, for instance, that there was a balance due on February 19, 1915, of \$36,807.04 cannot be true since it concerns transactions after that date. This was the balance I sought. Furthermore the account, though professing on its face to be supported by numbered vouchers, was not so supported. The testimony in regard to it was confused, uncertain and lacking as regards many items and there was much omitted that should have been included. I found it impossible either to adopt the report or to state any account in debtor and creditor from the beginning. Accordingly, I accepted as true, a statement of a balance due on March 15, 1915, contained in several documents on file in this court, verified by the oath of Mr. Rauer. It is idle for counsel to say that these documents were hastily prepared. Attorneys should not prepare documents in a legal proceeding hastily, nor should their client verify them unless he is ready to be bound by the statements therein. In taking these figures as I did, shown in these

verified statements as true, and proceeding thereafter to deduct items erroneously included and to charge Mr. Rauer with funds which should be turned over to the Trustee, I conceive that in all respects I am [55] following the order of reference directing me to find the state of the account between the parties. At page 11 and following of defendant's objections and also in the supplemental objections, it is claimed that the item of \$7500.00 credited the company on the Wehrle mortgage debt was or must have been already accounted for in the statement of account as of March 15, 1915, hereinabove referred to. It was argued that this conclusion is supported by the fact referred to in my report, page 7, that there is but slight difference between this statement of account and the amount of outstanding checks shown in the gray book. It is therefore concluded that the March 15th statement included all the outstanding checks and that the balance due on the mortgage must have been carried in open account. The answer to this, however, is that the papers drawn by Mr. Rauer's counsel and verified by him in which the balance is stated also stated the *entire receipts* by Rauer from the Sunset Company since March, 1911, and the *entire payments* since that date. They must, therefore, charge the indebtedness by mortgage and it follows from this that any collection from the security thereafter made is one not represented in the balance stated on March 15, 1915. Another misapprehension is shown in the statement of the original objections, page 40, with respect to certain

checks drawn by the Federal Construction Company, payable to the Sunset Construction Company. Complaint is made that these are charged against Rauer without evidence that he ever received them. The answer has already been given on page 31, lines 1 to 4 of the foregoing report, which show irrefutably that Rauer had already admitted receipt of these items in his statement of account Exhibit 1.

At page 30 and following of defendant's objections will be found a list of payments alleged to have been made by Rauer in the [56] way of repairs to the equipment for which he has been charged with rental and it is stated that the vouchers were in evidence. The numbered vouchers to which counsel refers in his brief are not in evidence. There were a number of bills offered and received without careful examination either by counsel or the Master at the time and these are separately returned. I have examined the transcript of evidence and also these bills. Many of them are duplicates; many concern the year 1918 and only 8 of them are receipted so as to constitute vouchers for payments. Such a loose and careless method of proof must carry its own penalty. I do not know and cannot find that Mr. Rauer paid these bills; they may have been paid by others renting the machinery, or paid in larger amounts, or not at all. The total amount of the bills which bear receipts on their faces is \$286.93. The only possible theory upon which these payments made after bankruptcy could be allowed would be that they

helped to produce rentals during the period when Rauer has been charged with those rentals. The amount of expenditures which were incurred during that period for which rentals have been charged amounts to \$148.43. Trustee's counsel, at one of the later arguments, was willing to concede this amount as a credit, though there is some doubt in my mind as to part of it. Under the circumstances, I will amend the report by allowing Rauer a credit of \$148.43.

At page 19 of the objections counsel alleges errors in the process whereby at page 7 of the report the balance claimed to be due Rauer on March 15, 1915, was figured back to February 19, 1915, the date of bankruptcy. I have gone over the cash book and the black book and have amended my figures by including only plain cash items and amending some doubtful items. The amended objections and especially the accompanying accountants' report pointed out a very patent error at page 8 of the report in that I have deducted the balance of payments to Rauer [57] over receipts from him from the March 15th figure, when it should be added thereto.

The tabulation on pages 7 and 8 should be corrected to read as follows:

1915

Feb. 24	Received J. J. Rauer,	C. B. 356	\$ 245.00
March 1	“ “	loan C. B. 360	30.00
2	“ “	“ “ 360	200.00
5	Paid, J. J. Rauer,	“ 361	\$355.00
5	Received, J. J. Rauer	B. B. 15	125.00
8	“ “	C. B. 360	300.00
12	“ “	loan “ 362	75.00
12	Paid, 2 City warrants,	B. B. 15	495.00
12	Paid, J. J. Rauer,		
	check of Scott,	B. B. 15	535.00
12	Paid, R. Monigan, col-		
	lection cash,	B. B. 15	35.00
15	Received, J. J. Rauer		
	Loan,	C. B. 362	175.00
			<hr/>
			\$1420.00 \$1150.00

The difference between amounts received from Rauer and paid to him is \$270.00. Adding this sum to \$28,874.82, the amount of the account on March 15, 1915, brings the state of the account on February 19, 1915, to the sum of \$29,144.82.

In the deductions that follow on page 8 of the draft report, are included \$897.00, excessive interest (report page 15) and also \$2001.60, due to an admitted error in Rauer's bookkeeping, with interest thereon, making a total of \$2898.60. Deducting these amounts from \$29,144.82 gives us

the figure of \$26,246.22 as the correct amount of the debt due to Rauer on February 19, 1915, instead of the sum given in the foregoing report, for example, in the summary at page 33.

Other deductions shown in the summary and in the report were all in the nature of collections by Rauer of assets of the Sunset Construction Company existing at the date of bankruptcy or were earnings of the property of the company thereafter, to which the [58] trustee, and not Rauer, was entitled. The method employed by counsel for the trustee in their briefs and the method accordingly adopted by the Master in the foregoing report was to credit Rauer with the debt of the Sunset Construction Company and to charge him with these collections made after bankruptcy. This will be clearly seen in the foregoing summary on page 33, resulting in a balance due to the Trustee there shown of \$7278.65.

There are now presented two objections to the draft report by the trustee. The most important of these points out that this procedure of accounting was incorrect in that it resulted in paying off Rauer's debt in full and devoting only the balance to payment of such other creditors as may have proved their claims in the bankruptcy proceedings. The Trustee points out that Rauer should be ordered to turn over all these collections to the Trustee and, of course, it follows that he should also be allowed to prove his debt for his share of any dividends which may be declared. It is surprising that this point has hitherto escaped the

attention not only of counsel, but of the Master. The validity of the objection seems obvious and the point irrefutable. It results that no statement of a balance due can be declared in these proceedings, but there must be found an amount for which Rauer is chargeable, to be ordered turned over to the Trustee; and likewise, there must be found the amount of the debt of the Sunset Construction Company to Rauer at the date of the adjudication in bankruptcy.

In view of this apparent error and of others pointed out in the objections and the amended objections, I have taken the occasion to completely re-examine the whole report as concerns this post-bankruptcy period. I have not restricted myself to the objections pointed out by either party. The error above pointed out is clearly [59] seen in my statement of principles, page 17 of the report. Paragraphs 1 and 3 are correct in charging against Rauer the money collections and rentals, but they are incorrect in applying these amounts in equivalent reductions of the indebtedness at the date of bankruptcy.

Paragraph 2, page 17, is stated, I think, too strongly against the defendant Rauer. In brief, I have stated as a principle to be followed that where the sources of collections were not known, so that I could determine whether they were assets arising prior to bankruptcy or subsequent to bankruptcy, I would consider the prior assets to the extent that Rauer had himself applied them in cancellation of unpaid checks against him before

the bankruptcy date. This I think open to criticism. After all, Rauer's action amounts only to a presumption of an evidentiary character. The burden of proving that the collections made after bankruptcy were of prior assets is on the trustee. It must be remembered that Rauer dealt with the Sunset Construction Company after Buckman's bankruptcy undoubtedly on the theory that he was safe in so doing, since the company had not been declared bankrupt. This being the case, the application of collections to debts of date prior to bankruptcy or to debts of a date subsequent to bankruptcy would not be covered by any principle in Rauer's mind which would aid us in determining whether the assets collected arose prior or subsequent to the bankruptcy date. On reconsideration, therefore, I have eliminated a number of charges against him heretofore made.

On page 18 of the report the item of \$990.00, proceeds of city warrants, should be omitted. This was collected on February 10, 1915, before the date of bankruptcy. [60]

On page 19 of the report, the Webb collection on May 20, 1915, of \$137.50, is omitted. As to all these Fourteenth Avenue bills there was a question whether it was for grading done before bankruptcy or paving done after bankruptcy. There was a grading charge against Webb, voucher 2234, for this amount and also a payment on May 20th (C. B. 2) by check turned over to Rauer. It is claimed, however, in the amended objections that this amount was in payment by way of compro-

mise of a larger bill for paving (objections 14-a) and that the prior bill had been paid on February 3, 1915. At page 338 of the cash book under this date appears the entry of a receipt on account of Fourteenth Avenue from "J Weissben, Webb. sign. \$125.00," which check was not turned over to Rauer. See also page 33 of the gray book. In view of the fact that voucher 2233 for grading, \$137.50, against Thomas A. Vogel, seems also to have been paid, C. B. 322, on January 26th, by Weissben, in the same sum of \$125.00, there is some indication that counsel's contention is correct and accordingly I eliminate this charge.

As regards charges, report page 19, for collections from Hyman, I have concluded to eliminate the charge against Rauer for \$500.00 collected on June 4, 1915. The receipt in evidence bears what purports to be Rauer's signature but he denied its identity and it may well be that his name was signed by Buckman. There is enough doubt to warrant a reconsideration in this respect. Counsel's statement in the amended objections, page 13, that my finding that the grading charge against Hyman was \$1,419.00 is arbitrary and not sustained by any evidence whatsoever, is a reckless assertion in view of the fact that voucher 2239 therefor reads in terms, "For grading Fourteenth Avenue," etc. [61]

On page 19 of the report I have eliminated the item of \$2,830.50 charged against Rauer and charge him only with the Dufau check, \$20.00, the check of Rider \$245.00 and with \$649.00 from H. Meyer,

the amount of his grading bill, voucher 2232, being part of a larger payment made by him on May 25, 1915 (C. B. 2 page 2) in the sum of \$3,148.04, and the check turned over to Rauer. As regards these matters Rider, in fact, paid Rauer \$306.70 of which \$245.00 was the proceeds of a note given by him to the company and turned over to Rauer on February 24, 1915, which seems clearly for work done prior to bankruptcy. As for the check of \$3,148.04 of H. Meyer I am, on reconsideration, unable to determine that any of this was for work done prior to bankruptcy except the sum of \$649.00 mentioned. So also as to the items on page 20 of the report where I have charged Rauer for portions of checks of Getz, Gardizer and Jordan, the amount of the charge being a total of \$1,200.00. My reconsideration leads me to conclude that it is not sufficiently proved that those assets arose prior to bankruptcy. As regards the collections made on Fourteenth Avenue grading contracts, defendant's counsel in the amended objections frequently assert that they were made to Rauer by virtue of assignments executed more than four months prior to the bankruptcy. I have no knowledge that this is so. It was the office of the objections to point out this evidence clearly stated in the proofs before me. No written assignments are in evidence and the Master is not obliged to wander at large through an extensive record in search of the evidence asserted to exist.

I come now to the sum of \$10,763.59 charged against Rauer in the draft report, page 25 and following, on account of his collections from the Fed-

eral Construction Company. The draft report recognizes [62] that while part of this collection was for rental of equipment, part was for services of Buckman and no segregation was made in the report for lack of proof of the value of Buckman's services. The claim was assigned by the Sunset Construction Company to Rauer in June, 1916, and so far as any value could be predicated on Buckman's services, Rauer was entitled to that value, not the trustee, since the service was all done subsequent to Buckman's bankruptcy. I am not satisfied with my disposition of the matter, which is, of course, based solely on the fact that the evidence does not afford me an adequate guide to apportion part of this money to the account of Buckman's services and part to the account of rental of equipment. I have concluded, therefore, to adopt a *judicium rusticum* and cut the charge in half on the assumption that Buckman's services were worth an equal amount with the rental of the equipment.

As regards the item of miscellaneous collections, page 21 of the report, I have yielded to objections on behalf of Rauer to the extent of deducting \$100.00 therefrom on the claim that of the \$500.00 order upon Bosworth turned over to Rauer, he collected only \$400.00. The other charges seem to me proper. With respect to the Reeder & Foster item, the amended objections, page 21, states that the black book, page 31, by which must be meant the cash book page 31, "Shows this \$407.20 to have been paid by the Sunset Construction Company to Cramer. Rauer received not one cent of it and

surely should not be charged with it. That transaction was in July, 1915, and Mr. Rauer had nothing whatever to do with it." This is a very mistaken and reckless statement of the facts. Cash book #2, page 30 shows that on July 6th, the Sunset Construction Company received from Foster & Vogt (which seems to have been another name for Reeder & [63] Foster) in full for June team hire, the sum of \$907.20. Page 31 shows that on July 3 there was given to D. F. Cramer an order on Foster & Vogt for \$500.00 and on July 6th, to J. J. Rauer a like order for \$407.20. This was the bookkeeper's crude method of indicating that Foster & Vogt had paid their bill by signing two orders in the total sum of the amount of the bill. Rauer's statement of account acknowledged the payment. It is idle for counsel to say that Rauer had nothing to do with this transaction.

The foregoing represents all the modifications that have been made in the draft report. The following is a tabulation of the amounts which have been charged against Rauer as assets of the Sunset Construction Company at the time of bankruptcy, collected by Rauer subsequent thereto, together with their dates, where suggested, and a reference to the pages of the draft report:

Page 19:

1915.

March	11	1	city warrant	.....	\$	495.00
May	31		Check of Hyman	.....		750.00
"	24	"	" " "	.....		250.00
"	25	"	" " Dufau	.....		20.00
"	25	"	" " Ryder	.....		245.00
"	25	"	" " H. Meyer	.....		649.00

Page 22: Miscellaneous collections .. 1,607.20

Page 24:

1916.

Jan.—Rental of equipment on

"T" Street job \$1,312.50

Less repairs 148.43 1,164.07

Miscellaneous collections of rent-
als 2,461.13

Page 31:

½ Federal Construction Company
payment 5,381.79

Total \$13,023.19

[64]

The Trustee also objects that Rauer should be charged interest on these sums from the time they were received by him. The allowance of interest is in the discretion of a court of equity and it seems to me that where the liability is disputed and dependent, as here, on the issue of litigation to determine the fact of liability, the delay in payment should be considered the act of the law and interest should be allowed only from the date of the

assessment of the amount due in the Master's report. We are now in a position to summarize.

It has been determined that the amount owed to Rauer on February 19, 1915, was \$26,246.22 (*ante* page 42). If nothing had been paid on this account he would be entitled to prove a claim for this amount. It has appeared in evidence, however, that in December, 1915, he credited \$6000.00 in the extinguishing of the mortgage to Viola Clark as Rauer's trustee, and on July, 1915, received from the Taylor Estate \$1500.00 in satisfaction of a claim assigned to him by the Sunset Construction Company more than four month prior to the bankruptcy. He was clearly entitled to retain these moneys, but the amount due as of February 19, 1915, \$26,246.22, has evidently been extinguished to that extent, leaving his provable claim in the sum of \$18,746.22. Thus there is due to Rauer the last mentioned sum to be paid in due course of administration, and there is due from Rauer to the bankrupt estate the sum of \$13,023.19, to be paid forthwith in full, to the Trustee. There is deposited in court, however, the sum of \$3701.60, the proceeds of sale of the chattel mortgage security and note held by Rauer. This note would constitute a preferred claim and the money impounded is payable to him. It seems to me that under these circumstances, account can [65] be taken of this fact in this report. If, therefore, we deduct from the two sums given above the sum of \$3701.60, Rauer's claim will be reduced by the amount of the security thus applied and at the same time the

funds now in court will be released for the general purposes of the estate, rather than paid to Rauer, and at the same time save him from paying in that much additional money. Deducting \$3701.60 from the \$18,746.22, we have \$15,044.62 due to Rauer from the estate in bankruptcy, and deducting a like amount from \$13,023.19, there is due from Rauer to the Trustee the sum of \$9321.59.

I accordingly conclude and report:

1. That \$3701.60 now deposited with this Court in the Matter of the Bankruptcy of Buckman should be declared due to J. J. Rauer, but that the same should be retained and payment made by credit on the amount hereinafter declared to be due to the Trustee from said J. J. Rauer.

2. That there is now due and payable from J. J. Rauer to the plaintiff Trustee, after crediting said sum of \$3701.60 now in Court, the sum of \$9321.59, with interest from date of this report at the rate of seven (7%) per cent per annum.

3. That there is due from the Trustee, plaintiff herein, to said J. J. Rauer, the sum of \$15,044.62 after crediting on said debt the above sum of \$3701.60; that said claim should be allowed in the estate in bankruptcy of said A. E. Buckman as an approved claim in favor of said J. J. Rauer, to be paid in due course of administration.

4. That plaintiff should have his costs. [66]

Each party will be deemed to have objected to the changes made in this supplemental report.

The foregoing draft report as modified by this supplemental report is hereby settled, signed and

filed as my final report herein, and the parties notified by me this 12th day of December, 1921.

H. M. WRIGHT,
Special Master. [67]

LIST OF EXHIBITS.

Exhibit No. 1, Statement of account of J. J. Rauer.
Exhibit No. 2, Statement in explanation of account.
Exhibit No. 3, Amended and supplemental account.
Exhibit—Black book of Sunset Construction Co.

- “ Gray book of Sunset Construction Co.
- “ Cash book of Sunset Construction Co.
- “ Cash book of Sunset Construction Co.
- “ Voucher book of Sunset Construction Co.
- “ 4 check books of Sunset Construction Co.
- “ Bundle of checks of Sunset Construction Co. and of J. J. Rauer.
- “ Certified copy decree Wehrle vs. McCoy.
- “ Letter of Pacific Gas & Electric Co.
- “ Bill #2371 to O. Heyman Bros. and copies Heyman's ledger sheets.
- “ Copy note, etc., dated Nov. 11, 1911.
- “ Stipulation and various exhibits.
- “ Copy Federal Construction Co. ledger sheet.
- “ Copy Federal Construction Co. journal sheets.
- “ Assignment Rauer vs. Buckman.
- “ Receipt Rauer to Heyman June 8, 1915.
- “ Sand machine statement and copies of B. P. W. certificates.
- “ Rauer's ledger sheets.

- “ Statement beginning May 20–21, 1915.
 “ Pay-rolls and various bills.
 “ Miscellaneous papers and checks.

[Endorsed]: Filed Dec. 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
 [68]

Record of Haskins & Sells, Public Accountants.

New York
 Chicago
 Philadelphia
 Detroit
 Cleveland
 Saint Louis
 Boston
 Baltimore
 Pittsburgh
 San Francisco
 Los Angeles
 Buffalo
 Cincinnati
 New Orleans

HASKINS & SELLS
 Certified Public Accountants
 Cable Address “Haskells”
 Crocker Building
 San Francisco

Kansas City
 Seattle
 Portland
 Denver
 Atlanta
 Dallas
 Salt Lake City
 Tulsa
 Watertown
 London
 Paris
 Havana
 Shanghai

August 17, 1921.

In the Southern Division of the District Court of
 the United States in and for the Northern
 District of California, Second Division.

No. 233—IN EQUITY.

GEORGE J. HATFIELD, Substituted for R.
 CORDS, Jr. as Trustee of the Estate of
 A. E. BUCKMAN, Bankrupt,
 Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. H.
 CHAPMAN, FILMORE BUCKMAN,
 SUNSET CONSTRUCTION COMPANY,
 a Corporation, et al.,

Defendants.

Mr. J. J. Rauer has submitted to us for examination the copy of the Master's report on accounting in the above-entitled matter, and also Mr. Rauer's own explanation of his account and a copy of said account, and his criticism of the conclusions reached in the Master's report on accounting. We have carefully gone over these documents, and submit the following brief conclusions without having made an examination of the records or books of account of either Mr. J. J. Rauer or the Sunset Construction Company.

As to ascertaining the balance owing by the Sunset Construction Company to Mr. Rauer on February 19, 1915, by taking as a basis the amount of a balance stated by Mr. Rauer as being the balance due him March 15, 1915, it is our conclusion that the deductions [69] and additions made to this balance according to the Master's report should be reversed. Assuming the total paid to and received from Mr. Rauer in the period from February 19, 1915 to March 15, 1915, as stated in the report, and the balance as of March 15, 1915, as stated, we would arrive at the balance as of February 19, 1915, as follows:

Balance due J. J. Rauer March 15, 1915,	\$28,874.82
Add payments to Mr. Rauer from February 19, 1915, to March 15, 1915,	3,212.45
Total	<hr/> \$32,087.27

Deduct receipts from Mr. Rauer from	
February 19, 1915, to March 15, 1915,	1,025.00

Balance due J. J. Rauer, February 19,	
1915,	\$31,062.27

By taking the balance owing to Mr. Rauer thus arrived at as the balance on February 19, 1915, and credited Mr. Rauer with all money received from him between February 19 and March 15, namely, \$1,025.00, and charging him with all moneys paid to him between February 19 and March 15, namely, \$3,212.45, it will be seen that the balance of \$28,874.82 would be the balance due Mr. Rauer on March 15, 1915.

We have examined a statement submitted by Mr. Rauer which, we understand, shows the transactions with the Sunset Construction Company as recorded upon his books. This statement shows a balance on the account to February 19, 1915, of \$38,407.95, due Mr. Rauer.

As to the items of \$1500.00 referred to on line 19, page 10, of the Master's report, and \$6,000.00 referred to on line 23, page 10, of the same report, these amounts appear to have been credited the Sunset Construction Company account, according to the statement submitted to us, and it would therefore appear that the deduction of \$7,500.00 made by the Master, as shown on lines 1 to 8, page 12, of the report referred to, is a duplication of these credits. [70] Although the dates and amounts of these credits as shown by the statement are July

20, 1915, \$1,500.00, and December 7, 1915, \$6,000.00, the credits are applied against the balance of the 1911 account, which balance was not carried forward. If this balance had been carried forward into the subsequent accounts, these credits should have been allowed therein, but it not having been done, the credits would not appear as again applicable to accounts after 1911, the balance in favor of Mr. Rauer on this date being wiped out by these credits.

In as much as we have made no examination of the books, we cannot give an opinion as to the correctness of any of the balances or items referred to, but from the data submitted the discrepancies as noted above appear clear to us.

As to the question of grading bills and paving bills collected by Mr. Rauer, we have not had the opportunity to examine the books and can express no opinion as to the propriety of these charges.

The question as to whether or not Mr. Rauer is entitled to rentals on his patent rights, or is to be charged rentals for the equipment, and whether or not he is entitled to deduct betterments, repairs, and expenses, is not so much an accounting question as one of law. By examination of the books and records, the correct amounts could probably be ascertained or verified.

The Master's report in connection with the Federal Construction Company job, lines 23 to 25, page 30, shows several items charged Mr. Rauer which are indicated as being received by the Sunset Construction Company from the Federal Construction

Company, as shown by the transcript of the Federal Construction Company's ledger, as indicated. These items are:

Nov. 20, 1915, cash to Sunset Construction Company	\$150.00
Nov. 30, 1915, cash to Sunset Construction Company	200.00
Dec. 22, 1915, cash to Sunset Construction Company	250.00
Jan. 22, 1916, cash to Sunset Construction Company	300.00

[71]

Also, on page 31, line 26, an amount of \$2,212.78 for checks paid to Buckman is by the Master's report charged to Mr. Rauer.

Respectfully submitted,

HASKINS & SELLS. [72]

In the Southern Division of the District Court of the United States in and for the Northern District of California, Second Division.

No. 233—IN EQUITY.

GEORGE J. HATFIELD, Substituted for R. CORDS, Jr., as Trustee of the Estate of A. E. BUCKMAN, Bankrupt,

Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. H. CHAPMAN, FILLMORE BUCKMAN, SUNSET CONSTRUCTION COMPANY, a Corporation, et al.,

Defendants.

Observations upon Master's Report. [73]**EXPLANATION OF THE ACCOUNT OF J. J. RAUER, AND THE ITEMS ENTERING INTO THE BALANCES SHOWN THEREIN.**

Page 1. This shows the account balanced as of Dec. 9, 1911, at \$19,629.16.

To arrive at this balance, credits are given to Sunset Construction Co. of the following items:

Jan. 25, 1912, Mortgage.....\$6,734.16

July 20, 1915, Taylor Estate..... 1,500.00

Dec. 7, 1915, a/c Mortgage..... 6,000.00

It will be noticed that the last two items (aggregating \$7500) were not entered until afterwards. The explanation of this is that the account was originally balanced by the note for \$15,000 to secure the payment of which the property was transferred to Clark. This property was carried as security for some time for the balance on this note which had been reduced by the payment of \$6,734.16, on January 25, 1912, to about \$8000.00. Finally, on December 7, 1916, the matter of its continuing as security was determined by crediting against the balance owing on the \$15,000 note, the \$6,000 and the \$1500.00, and wiping out that obligation entirely.

That this account was so balanced by the \$15,000 note, upon which the balance of about \$8000 was secured by the real estate mortgage and that the \$8000 balance did not enter into the subsequent accounts or balances, and was kept entirely separate, and was subsequently paid and balanced by giving

credits for the balance of the mortgage of \$1500 and \$6000 is conclusively shown by accounts and statements and balances that follow;

It will be seen that the balance on Dec. 9, 1911, is not carried over to the next account as \$8000 or \$7500, the balance then unpaid on the \$15,000 note, but no debit balance at all is carried over; the balance carried over being a credit balance instead of \$46.66, that Rauer owed the company. And therefore when this debt is afterwards fully satisfied by the credits of \$1500.00 and \$6000.00 for the mortgaged property, these credits can apply to this account alone and not to any subsequent accounts or balances.

The next account, Jan. 9, 1912, starts with a balance [74] against Rauer of \$46.66. If the balance on the note had been taken into consideration and carried forward, this balance would have been over \$7000 in Rauer's favor.

The account beginning Jan. 9, 1912, and ending February, 1912, which account is balanced by the Sunset Construction Co. owing to J. J. Rauer \$765.84, does not take the balance on the \$15,000 note into consideration either.

Page. 2. The balance carried over from page 1, is here shown as \$765.84, and as we have stated, if the \$8000.00 balance on the \$15,000.00 note had been taken into consideration the balance in Mr. Rauer's favor to start out on this account would have been \$8,765.84; and this account on page 2 is balanced by showing an indebtedness to Mr. Rauer thereon, as of November 24, 1912, of \$8,125.00.

As will be seen from this account, the \$8000.00 balance on the \$15,000.00 note has not been taken into consideration therein whatsoever; that this \$8000.00 balance is in existence is shown, however, in this account by the mention thereof on May 25th, showing the giving of a check for \$661.74, "Make balance 15 to 8." This check, however, was not paid, and it is charged back as one of the unpaid checks on the other side of the balance. This balance of \$8,000.00 is not there taken into account whatsoever. Had this balance of \$8,000.00 on the \$15,000.00 note been taken into account, the balance on November 24th, owing to Mr. Rauer would have been, instead of \$8,125.00, \$16,125.00. [75]

Page 3. Page 3 shows, at the beginning, a statement of the balance on the \$15,000 note as \$8,000, but this balance, as the account shows, is not taken into consideration in the account itself, which on February 8th is balanced to show an indebtedness of \$12,500 owing to J. J. Rauer. If this balance on page 3 stated as of Feb. 14, 1913, had taken into consideration the \$8000.00 balance on the \$15,000 note, it would be \$20,500, instead of \$12,500.

Page 4. Here the balance of \$12,500 is carried forward and again stated as of Jan. 1, 1914, as being \$12,500. And the same is true that if the \$8,000 had been taken into consideration, this balance would have been \$20,500.

This balance of \$20,500 agrees materially with the statement that appears in the Sunset books as of Dec. 12, 1913, pages 4 and 5, as follows:

“Balance due J. J. Rauer to this date, \$20,000. All other money due J. J. Rauer covered by ck. and orders.”

The last account on page 4, shows a balance as of Feb. 16, 1915 (just previous to the insolvency) in favor of J. J. Rauer of \$33,084.95. This balance, as the account plainly shows, and is verified by the quotation from the Sunset books above given, did not take into account the \$8,000 balance owing on the \$15,000 note, and if this had been taken into consideration the balance instead of being \$33,084.95 on that date, would have been \$41,084.95.

Page 5. Here it is shown that the balance of \$33,084.95 stated on page 4 should be still further increased by certain unpaid checks issued to Rauer between May 22, 1913, and Feb. 8, 1915, which had been omitted from the previous statements, and which total \$4,652.70. This added to the \$33,084.95, makes the balance owing Rauer on Feb. 19, 1915, \$37,737.65, and nowhere in those [76] balances has the \$8,000 owing on the \$15,000 note been added in; if this were added in, the actual balance then owing to Rauer would have been \$45,737.65. And only if the balance had been so figured (including this \$8,000) would it have been proper to deduct the allowance made for the mortgage equity therefrom.

It will also be noticed that at the date of the ending of the first account (December 9, 1911) (page 1), the first Sunset Construction Company came to an end, and in order to balance its account gave the note for \$15,000, made the mortgage on the Clark lots

for \$9,000.00, paid a part of this \$9,000 on the \$15,000 note and reduced it to about \$8,000, and provided that the conveyance of those lots to Clark shall stand as security for the payment of the \$8,000 balance on the \$15,000 note. This is the reason why the \$8,000 balance never subsequently figured in Mr. Rauer's accounts, and therefore when this \$8,000 balance of the \$15,000 note is wiped out by the credit for the equity of the mortgage, this credit of \$1500 and \$6,000 should not be deducted from the subsequent accounts. That this is so, is fully admitted in plaintiff's opening brief, pages 1 and 2, and there can be no escape from the correctness of this conclusion.

The Master, however, has entirely disregarded the statements made and the balance as shown by Mr. Rauer's accounts as submitted, and has taken instead a figure hastily cast by Mr. Rauer as the balance as of March 15, 1915, of what? Of the moneys secured by the chattel mortgage; and which Mr. Rauer so hastily made from his books late in 1916, and for a purpose not of stating the actual or full account, but for the purpose of laying the foundation for his rights to ask for the foreclosure of a chattel mortgage.

And right here it must be remembered that when Mr. Rauer so hastily cast his balance from his accounts he did so from the accounts above referred to, which did not take into consideration the \$8,000 balance on the \$15,000 note given at the closing of the accounts of the first Sunset corporation; and consequently there is no rhyme or reason that from

this \$28,874.82 so hastily stated [77] as the balance, there should be deducted the credit given for the equity of the mortgage given to secure this \$8,000.00 balance, which never entered into these accounts.

When this petition stating the balance at \$28,874.82 was sworn to (Nov. 13, 1916), the \$8,000 balance on the \$15,000 note had been settled by allowing the \$7,500 in full for the equity of the mortgage securing it, and had been so credited in the separate account balancing the \$15,000 note and the account of the first corporation.

It must also be borne in mind that in this very petition (which the Master attempts to make the starting point for this accounting) this \$28,874.82 is described as "all secured by chattel mortgage" thus showing in itself that it excludes the \$8,000 balance of the old account, which was secured by the real estate mortgage given to Clark. Therefore again we see that the credit given for this equity of the real estate mortgage in settlement of the \$8,000 cannot be deducted from the \$28,874.82.

If the Master takes this statement for one purpose, viz., that of stating the balance, he must give due effect to all the statements therein contained explaining what this balance is.

This real estate mortgage account of the first Sunset Company was finally wound up late in 1915, and the credit of \$1500 and \$6,000 properly given only in this account; and the petition stating this balance of \$28,874.82 was not filed for a year afterwards, and for every logical reason this balance did

not take into account this credit on the real estate mortgage.

Of course, the second Sunset Company had been given by Mr. Rauer the right to redeem from this real estate mortgage upon the condition that they would, during the time it had this right, pay the interest upon the \$8,000 balance, and it did pay the interest until the final agreement was made in December, 1915, that Mr. Rauer should take the property for his balance of \$8,000.00; and the only thing concerning the \$8,000 balance that ever figured in the [78] subsequent accounts was the interest paid thereon, and one check for \$661.74, which was given on May 25, 1912, to make the balance an equal \$8,000.00, and the accounts will show that this check was never paid, and was simply charged back.

Again, in the amended and supplemental account of Mr. Rauer, the latest item is dated in December, 1916, and the account was actually not filed until long after that (Oct. 29, 1917); and it was only when Mr. Rauer was casting this account that he discovered he had omitted from the previous statements the unpaid checks dated previous to February 19, 1915, which appear on page 5 of this account, and which total \$4,652.70.

It must therefore be clear that when Mr. Rauer hastily stated a balance for the purpose of the petition for foreclosure of the chattel mortgage (Nov. 13, 1916) that these checks, totaling \$4,652.70 were

not included in the balance there so hastily stated
 at\$28,874.82
 and that to get the true balance the total
 of these checks should be added thereto,
 viz. 4,652.70

making even the balance so hastily cast a
 total of\$33,527.52
 and this exclusive of the \$8,000 balance secured by
 the real estate mortgage.

As stated before, Mr. Rauer claims a balance owing him from the Sunset Construction Co. on February 19, 1915 (and which does not take into account the \$8,000 balance secured by the real estate mortgage) to have been \$37,734.65, and his accounts clearly show that this is the case. The Master has seen fit to start with a balance hastily cast for an entirely different purpose, and where the exact amount owing was not the question, but the only question was, was there a sufficient amount owing to warrant Mr. Rauer's request; and this was so hastily cast at \$28,874.82 as the balance as of March 15, 1915. [79]

This can in no way be taken as an admission by Mr. Rauer, and we think the purpose of this accounting is not to grab at some outstanding figure, the coming into being of which was for a purpose entirely different than an accounting, but that the purpose of this proceeding is to go into the actual accounting, and see whether this, or any other balance given, is correct.

Mr. Rauer cannot understand either why the balance between him and the Sunset Construction Co. should be restricted to the date of February 19, 1915, when his dealings with this company extended until its end in 1917, and when the Sunset Construction Company was never adjudged a bankrupt, and was at all times a separate entity from A. E. Buckman, and the creditors of the Sunset Construction Company had never in the Buckman proceedings, or any other proceedings, been notified to file their claims, or any action whatever in the shape of a bankruptcy proceeding taken against the Sunset Company, and Mr. Rauer and other creditors, were dealing with the Sunset Co. in utter ignorance that it could be affected in the slightest way by the Buckman proceedings, and even the trustee of Buckman, when he instituted these proceedings, only asked that he be adjudged, as the successor of Buckman, to be the owner of the stock of the Sunset Construction Co. Certainly this does not give the trustee any right to cut Mr. Rauer off at any particular arbitrary date with the Sunset Construction Co. and does not give the trustee the right to invalidate any of the acts of the Sunset Construction Company, which was a duly organized and functioning corporation.

It must also be remembered that every one of the contracts in which Mr. Rauer has been concerned was a contract made by the Sunset Construction Company, and not by Mr. Buckman, and the insolvency of a stockholder, whether he is the owner of one or practically all the stock of the corporation, cannot

directly affect the status of the corporation; and these contracts of the Sunset Construction Company cannot thereby become *ipso facto* the sole property of the stockholder. [80]

It is true the order making this reference to the Master for the accounting, does use some loose terms that standing by themselves, might be construed as holding that the property and contracts of the Sunset Construction Company became *ipso facto* the property of the trustee, but this cannot be its effect, for the foundation of this order, the petition or complaint of the trustee, does not ask any relief except to have it declared that the stock of the corporation is the property of the trustee as the successor of Buckman. Neither could this conclusion have been arrived at from the facts set up in the petition or bill; and besides to give it that interpretation would be nullifying the Insolvency Act, and this the Court could not do.

The only right which the creditors of Buckman individually can possibly have to the property or assets of the Sunset Construction Co. if Buckman had owned all the stock, would be the property that would remain after the Sunset Construction Company creditors had been fully satisfied; and not only its creditors up to February 19, 1915, but its creditors clear to the end of operations; and Mr. Rauer should be permitted not only to have all the property of the Sunset Construction Company applied to his debts and the debts of its other creditors up to February 19, 1915, but also to the end of their dealings.

In view of the foregoing position, of course, the Master's finding and report and the discussion thereon which follows, would be academic.

But even assuming that our position as just stated is not the correct one, and that the position that the Master has taken, viz.: that the contracts, instead of being the contracts of the Sunset Co., are the contracts of Buckman, and that they must all end so far as this matter is concerned as of February 19, 1915, there are certain matters in the Master's report even inconsistent with this position, which we shall now take the liberty to point out.

For instance: [81]

Referring to pages 7 and 8 of the Master's report:

The deductions there made from the \$28,874.82, taken by him as the balance on March 15, 1915, are presumably made for the purpose of arriving at the balance that was on February 19, 1915:

The item on line 21, of money "Paid,
J. J. Rauer to D. F. Cramer for stock hire
in advance\$200.00

And the similar item on line 28 of..... 704.96 cannot be deducted for this purpose, unless at the same time the credits therefor are given to Rauer on the other side of the account. These items appear to be money paid to Rauer for the purpose of paying it to Cramer for the purpose of paying for stock hire in advance. On the other side of the account Rauer is given no credit for these payments of these very sums to Cramer. Rauer did not get this money for himself, but he was simply the agent

to pay it out to somebody else. Assuming for the sake of argument that the balance owing to Rauer on February 19th was \$30,000, and on March 1st, Rauer was given \$30,000 by the Company to pay a debt of the Company to Cramer, and Rauer paid this \$30,000 to Cramer on March 10th. And on March 15th, Rauer makes a statement, which shows the \$30,000 indebtedness previous to Feb. 19th, and also shows that the Company had given him \$30,000 on March 1st to pay to Cramer for team hire in advance, which he had done on March 10th; then, according to the Master's arithmetic, the Company would have owed Rauer nothing on February 19th.

As a matter of fact, the check (No. 8536) for \$704.96 was never even paid by the Sunset Construction Company, and has been charged back by Mr. Rauer in his subsequent accounts on June 3, 1915. The fact is that both these sums should be credited on the other side of the account as money paid out by Mr. Rauer for the benefit of the Sunset Company. These two items alone would reduce the Master's deductions by\$904.96
[82]

The item: "March 5th, 'Paid J. J. Rauer \$355.00' shows on the black book, pages 14 and 15, to have been the repayment of two loans, evidently not even evidenced by checks, and was undoubtedly money given by Rauer to the Sunset Construction Co. out of hand to be repaid in a day or two, and was so repaid by two payments of \$230.00 and \$125.00. Rauer should be given credit for the money which

this repays, on the other side of the account, viz.:
 the sum of\$355.00

As to the item: "March 12th, Paid J. J. Rauer
 Checks taken up and interest..... 865.00

This should not enter into the deduction either,
 unless the checks taken up thereby and interest are
 also entered on the other side of the account, for
 these checks so taken up were unpaid on February
 19th, and instead of the balance on February 19th,
 being less by that amount then, it would be greater
 by that amount then the balance on March 15th.

But assuming the items, as stated by the Master
 on pages 7 and 8, state correctly all the credits and
 charges between Feb. 19, 1915, and March 15, 1915,
 which should be taken into consideration in figuring
 back from the balance stated on March 15th, to get
 the balance owing to Mr. Rauer on Feb. 19, 1915,
 then, we submit, the method of computation should
 be just the reverse of that employed by the Master,
 and to the balance stated as of March 15, 1915,
 as\$28,874.82

There should be added the amounts paid

to Mr. Rauer between February 19th

and March 15th, viz.: 3,212.45

\$32,087.27

And there should be subtracted the
 amounts paid by Mr. Rauer between

Feb. 19th and March 15th, viz.: 1,025.00

Giving the balance owing Mr. Rauer on

Feb. 19, 1915, as.....\$31,062.27

To prove this:

Start with the balance owing Mr. Rauer

Feb. 19, 1915, as.....\$31,062.27

Credit Mr. Rauer with all he loaned be-

tween Feb. 19, and March 15th..... 1,025.00

\$32,087.27

Debit him with all that was paid to him

between Feb. 19th and March 15th.... 3,212.45

Gives the balance owing him March 15,

1915, as\$28,874.82

Taking the balance so ascertained to be

owing to Mr. Rauer on Feb. 19, 1915..\$31,062.27

And adding thereto the sum of the checks

and payments omitted from Mr.

Rauer's previous accounts, and which

were made prior to Feb. 19, 1915, but

as to which Mr. Rauer did not discover

until long afterwards that they had not

been entered in his books (see page 6 of

his account) 4,652.70

Gives the balance owing Mr. Rauer Feb.

19, 1915, as\$35,714.97

(Taking, of course, as a basis the balance so stated by Mr. Rauer for an entirely different purpose as of March 15, 1915.) [83]

Page 12, lines 1 to 8 of the Master's report, deals with the \$7500 deduction, which we have fully

covered in the opening paragraphs of this statement, and in the explanation of Mr. Rauer's account; where we have shown that these credits for the equity of the real estate mortgage do not belong to this account at all, but are a cancellation of the \$8000 balance on the \$15,000 note, owing by the first corporation in the final closing of that first corporation's account.

We again call attention to the fact that in the plaintiff's opening brief, pages 1 and 2, he fully adopts the explanation we have given. He also does this throughout his other briefs.

Pages 17 to 20 of the Master's report concerns itself with the question of \$8,040.60, on account of the Fourteenth Avenue contracts. It is stated in the Master's report that part of this collection was on account of a grading job finished by the Sunset Construction Co. before February 19th, and part for a paving job entered into and finally finished long after February 19, 1915; that admittedly the money collected on the paving job should not be charged against Mr. Rauer, because Rauer did this himself, but that the money collected on the grading job belonged to the Sunset Construction Co. and became an asset of Buckman, and should be accounted for by Mr. Rauer. Mr. Rauer takes the position that the grading job was his by virtue of assignment from the Sunset Construction Company, and that he has the right to credit the collections he has made on either or both against any claims he has against the Sunset Construction Co. clear to the end of his dealings.

This grading job was completely finished before February 19th; it was entered into by the Sunset Construction Co., and the contract assigned to Rauer, many months previous to four months before the Buckman insolvency; that the collections were made by Rauer in pursuance to that assignment—and they are all his property to be [84] applied on his account as he sees fit.

And even if the Master's position be correct that the Buckman insolvency *ipso facto* threw the corporation also into insolvency, then Rauer would have his claim against the insolvent estate for everything that was owing him on Feb. 19th, and if he subsequently credited moneys that belonged to him against his balance, he would be permitted to correct this mistake.

But if for the sake of argument the position taken by the Master be taken as correct, then for the purpose of ascertaining the collections made by Rauer on the grading job, we suggest that the books of the companies concerned, and the grade sheets issued, and the estimates therein shown, and which are in evidence here, clearly indicate the amount estimated as the cost of the grading, and the amount estimated as the cost of the paving, and we see no reason why the arbitrary position should be taken of charging Mr. Rauer with every collection for which he delivered up a check dated prior to February 19th, when it positively appears that Mr. Rauer did not know and had no conception of the contention that is now being made that the Sunset Construction Co. was affected by the insolvency of

Buckman, and that he could not deal with the Sunset Construction Co. as a separate entity.

But taking up these items separately:

Lines 25 to 29, page 18, concern the item of \$990.00 collected by Mr. Rauer on February 10, 1915, from the city. It does not appear from the Master's report that this was for grading, but it is stated that at the same time two checks for the same amount which had been previously given to Mr. Rauer were surrendered to the Sunset Construction Co. by him and cancelled. The complaint is that the \$990 does not appear in the balance of February 19, 1915, nine days afterwards. May we ask why it should? If this \$990.00 appeared then the checks taken up thereby should also appear on the other side of the account and they would balance each other. Certainly the checks [85] paid on February 10, 1915, would not appear in the balance of February 19, 1915. This \$990 should not be charged to Mr. Rauer.

Items lines 12 to 19, page 19: Of this \$1,500 which is here charged against Mr. Rauer, H. Graham received \$500.00 on an order from the Sunset Construction Co., as part of a total order and sum paid him of \$1,179.03. (See Hyman Bros. account in the Sunset Construction books.) Surely the money paid to and received by H. Graham on an order from the Sunset Construction Co. cannot be charged against Mr. Rauer, who had absolutely nothing to do with it whatsoever.

Again:

According to this Hyman account in the Sunset Construction books there was paid to Buckman himself on account of the 14th Avenue work, by Hyman, in several installments, a total of \$788.00 on account of the grading contract. The amount of this grading charge against Hyman can be readily ascertained from the books above referred to, and the arbitrary finding that voucher No. 2239 to Hyman for \$1,419.00 is the grading charge, is not sustained by any evidence whatsoever, nor is the fact that a bill was issued to Hyman for \$1,419.00 any proof that the full amount of this was paid. The Hyman account shows that \$788.00 of the grading bill was paid to Buckman himself; and the account does not show that any grading charge was ever paid to Mr. Rauer. The books show the receipt by Mr Rauer of only two checks from Hyman, viz.: \$250.00 and \$750.00, but this was distinctly on the paving contract, which had been entered into after the insolvency and performed by Mr. Rauer. Therefore none of this \$1,500 and interest charged against Mr. Rauer should be so charged against him.

Line 22, page 19, states check of Meyer for \$3,-148.04 was turned over to Mr. Rauer on May 25, 1915, and he is charged therewith. The facts with reference to this are the following:

Two checks were given to Mr. Moran, one by H. Meyer [86] for \$1,398.04
and the other one from S. Meyer for 1,750.00

\$3,148.04

This was in payment for grading, sewerage, curbing and paving of 175 feet and 180.5 feet front at \$10.00 per running foot, under private contract to E. Moran, and which Mr. Moran split into three parts, performing the sewerage himself, assigning the grading to the Sunset Construction Co., and assigning the paving contract to Mr. Rauer, all after the insolvency of Buckman.

The paving was charged for at 26¢ per square foot. 355.5 ft. in length by 20 ft. in width, would make 7,110 sq. ft., which @ 26¢ per sq. ft. would be	\$1,848.60
and 355.5 ft. curbing at \$1.35 per ft. would be	479.92

This would make a total for curbing and paving of	\$2,328.52
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This Buckman of the Sunset Construction Co. never had anything to do with, and therefore the present account cannot be concerned therewith.

The full amount of the checks was	3,148.04
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The amount Mr. Rauer was entitled to for paving and curbing was	2,328.52
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The difference is the sum of	819.52
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If the theory of the Master be correct that Mr. Rauer is to be charged for any of his collections which could possibly be considered as coming from the grading contract, the only sum that he could be so charged with on these Meyer checks is \$819.52.

But the facts concerning the Fourteenth Avenue contracts and collections show that the persons from whom Mr. Rauer's paving bills were to be collected

were to quite an extent identical with those from whom the Sunset's grading bills were collectible, and that Mr. Buckman in collecting the grading bills was not over particular about confining himself to those, but also collected from some of these parties amounts owing to Mr. Rauer for the curbing and paving bills, and that because thereof Mr. Rauer collected the whole bill from Messrs. Meyer, so as to balance this against the collections on the paving bills made by Buckman for the Sunset from some of the others.

The following is Mr. Rauer's account for that job showing the charges for curbing and paving, and the amounts actually collected by or for him, and showing that, taking into account the extra \$819.52 collected from Messrs. Meyer, Mr. Rauer is still a loser on the Fourteenth Avenue collections of \$40.20, viz.: [87]

	Charge for Curbing and Paving
Webb	\$ 166.25
Ryder	319.20
Reva	322.21
Babbitt	366.51
Maloney	319.20
Katz	207.80
Jordan	157.50
Lathrop	198.75
Gardius	215.93
Solari	198.75
Getz & Sons	1,043.36

M. Baker)	210.00)
Hyman)	1,969.00)
Dufour	40.00
Henry Meyer)	
S. Meyer)	2,328.52
C. R. Russell	196.00
Tarpey	336.00
Corking	198.75

 8,793.73

 8,753.53

 LOSS to Mr. Rauer 40.20

Amt. Rec'd by Mr. Rauer or Others	Difference Collected by Sunset	Difference Collected by Rauer
\$ 137.50	\$ 28.75	
306.70	12.50	
322.21		
366.51		
250.00	69.20	
167.50	40.30	
83.65	73.85	
145.00	53.75	
160.00	55.93	
148.81	49.94	
1,043.36		
1,179.00 Graham		
1,000.00 Rauer		
40.00		
3,148.04		819.52

195.00	1.00
30.25	305.75
30.00	168.75
<hr/>	<hr/>
8,753.53	859.72

Lines 8-11, p. 19, the Master charges check from Webb (May 20, 1915, for \$137.50) to Rauer. The facts concerning that are these:

Webb's grading bill was \$125.00; this Buckman himself collected for the Sunset on Feb. 3, 1915 (See Sunset book 2, also book 1, p. 338). Webb's paving bill was \$166.25, and on May 22, 1915, Rauer collected thereon \$137.50.

The fact about the Dufau check of \$20.00 is that it was in part payment of a \$40.00 job assigned long before the insolvency, [88] and performed on a lot on 15th Avenue, and is not connected with the Fourteenth Avenue contract.

The facts about the Rider check (Master's report, p. 19, line 21) are these: Rider's grading bill was \$250.00, and for this he gave Buckman for the Sunset a note; Rauer's paving bill was \$319.20, and on this Rauer collected the \$306.70 check which the Master now says should be charged against him. (See Sunset books.)

Lines 5 to 11, page 20. Here the Master charges Mr. Rauer with \$400 and \$800 out of the following payments, viz.: \$1,043.36 and \$521.38 from Getz, \$83.75 from Jordan and \$160.00 from Gardizer, simply because Mr. Rauer delivered up two checks dated prior to Feb. 19th, on account of these payments, one for \$400 and one for \$800. The Master

states that the Getz payments were all for paving—and this is the fact. This is also the fact as to the Jordan payment. This is also so with the Gardizer payment, the full facts of which are these:

Gardizer's grading bill was \$149.00, and the curbing bill \$28.00, and Buckman collected both these amounts for the Sunset, one on June 2, 1914, and the other on June 3, 1915; and he also collected on July 1, 1916, Rauer's paving bill of \$215.93, and only paid to Rauer the \$160.00 thereof, which the Master now charges to Rauer. This looks like rubbing it in. It is fortunate perhaps that Buckman kept the rest of the \$215.93, for if he hadn't the trustee would certainly want to charge Rauer with that also.

These checks were in no instance for grading work, but in every instance only for paving contracted for and done after bankruptcy by Mr. Rauer, and are Mr. Rauer's own property which cannot enter into the account in any way. (See Getz's account in the Sunset Construction books,—also Jordan's account, book 2, page 12, and book 2, page 398, also Gardizer's account, which show that the amounts collected by or paid to Mr. Rauer were only for paving and curbing, and that the Sunset Construction Co. itself got all the payments for grading.) [89]

To sum up the Fourteenth Avenue contract matter:

Of the \$7,323.00 charged to Mr. Rauer by the Master on account of these items, the only amounts which could possibly be chargeable against Mr.

Rauer on the theory that the grading bills collected by him were assets of Buckman, could be the following, viz.:

March 11, 1915, collected from city.....	\$495.06
May 25, 1915, Dufau check for	20.00
a/c Meyer checks	819.51
<hr/>	
Total	\$1,234.57

But this grading contract was assigned to Mr. Rauer months before the bankruptcy of Buckman, and all collections thereunder absolutely belonged to Mr. Rauer to apply in accordance with the assignment, which he did; they were his moneys for that purpose, and if he mistakenly credited some of these on checks dated prior to Feb. 19, 1915, then instead of charging them over again to him, he is entitled to correct his mistake and charge that amount against his current account, which would leave the balance owing him on February 19th, just that much more.

And this leads us to once more survey the position taken in the Master's report that the date of Buckman's bankruptcy, February 19, 1915, is the time beyond which none of the dealings between Mr. Rauer and the Sunset Construction Co. can go, even though upon the dealings since that day the company owes Rauer a balance of \$18,614.54; and that all the moneys which Mr. Rauer collected after that date upon contracts assigned to him at any time before that date (no matter how long) must be charged against his account previous to Feb. 19, 1915, even though Rauer had given the

Company the cash therefor presently, or credit upon his current account after Feb. 19, 1915, and that also all moneys with which he took up any checks dated prior to Feb. 19, 1915, were to be charged against him in his transactions previous to Feb. 19, 1915, though they came from dealings entirely subsequent to and disassociated from the insolvency, and he had a right to apply them upon his accounts after Feb. 19, 1915. In other words the trustee intends to get Rauer both coming and going; consistency bothers him not. Quoting [90] from the Master's report (page 16, lines 17-25):

“As I have stated, that company continued doing business and its relations with Rauer continued exactly as if no bankruptcy of Buckman had occurred. Collections were made upon contracts completed before bankruptcy. Some of the money was either collected by or immediately turned over to Rauer. The moneys received were applied by him not only for current interest, but in cancellation of loans, and the application was indifferently made to loans prior to the bankruptcy date and to loans subsequent thereto.”

The Master here fully recognizes the *bona fides* of Mr. Rauer's position and dealings. Mr. Rauer in none of his transactions dealt with Buckman personally, but only dealt with the corporation, and considered no doubt that the only matter Buckman's insolvency could affect was the ownership of the Buckman stock. And in this he was legally correct. And if the trustee takes a different posi-

tion, he should at least take a consistent one, viz.: either, that the transactions ended Feb. 19, 1915, and all contracts of the Sunset then made became *ipso facto* by Buckman's insolvency the property of the trustee, and that likewise all claims then against the Sunset became *ipso facto* the debts of the bankrupt estate; in which event the collections made by Rauer on contracts entered into subsequent to that date are Rauer's to be credited on the Sunset Construction Co's current accounts, and not on those of the bankrupt estate; for such collections and the right to apply them on the Sunset's accounts are Rauer's property and not the trustee's, and if Rauer applied some part thereof upon the debts owing him prior to Feb. 19, 1915, it must be recognized that he did so under a mistaken thought that he was applying them on the debts of the Sunset Construction Co., whereas he was thus in fact applying them on the debts of the bankrupt's estate or, the trustee must take the position that the debts previous to Feb, 19, 1915, do not, by Buckman's insolvency, *ipso facto* become the debts of the insolvent estate, but continue the debts of the Sunset Construction Co., and in which case the assets of the Sunset Co. would likewise not become *ipso facto* the assets of the [91] insolvent estate, but would also continue the assets of the Sunset Co., and in which event the accounts cannot stop at Feb. 19, 1915, but must be settled, both for debits and credits between the Sunset and Rauer, as of the end of their dealings.

Page 20, lines 1 to 4, the Master charges against Mr. Rauer four different items amounting to \$1,-707.20.

As the first item, "Academy of Science \$300," the facts are these:

Mr. Rauer finished, in July 1915, the contract for the Academy of Sciences, on which it had held out \$300.00. Mr. Rauer expended on this matter and paid on Aug. 5 and 9, 1915, so that he might be entitled to the \$300.00, the following sums:

Pay roll	\$298.60
.. Stock hire	252.00
	<hr/>
Total	\$550.60
Amount received	300.00
	<hr/>
LOSS to Mr. Rauer ..	\$250.60

[92]

Surely there is no reason for charging Mr. Rauer with this \$300 when he actually lost on that contract \$250.60.

As to the item of Reeder & Foster, \$407.20, the facts are these:

The black book, page 31, shows this \$407.20 to have been paid by the Sunset Construction Co. to Cramer; Rauer received not one cent of it, and surely should not be charged with it. That transaction was in July, 1915, and Mr. Rauer had nothing whatever to do with it.

The Bosworth bill was \$500, but all that Mr. Rauer ever collected on it was, on a compromise, \$400.

The Iverson matter Mr. Rauer himself charges against his account in his statement, page 6.

To recapitulate matters, p. 21, line 23, to p. 22, line 4:

The only items which Mr. Rauer can possibly be charged with under the theory of the Master, are the following:

Bosworth	\$400.00
Iverson	500.00
	<hr/>
	\$900.00

instead of the \$1,707.20 charged.

Page 22, line 5, to page 24, line 30:

The Taraval Street contract was a public contract awarded to Mr. Rauer, and he agreed with Sunset Construction Co. that for the use of the equipment, the profits of that contract would be credited on the balance owing to Mr. Rauer from the Sunset Construction Company. There were no profits on this job, but instead there was a loss of \$804.33.

The Trustee is forever blowing hot and cold. He failed to exercise the control over the Sunset Construction Co. which his ownership of the bulk of the stock entitled him to; but instead permitted the old officers thereof to conduct its affairs, which [93] they had a perfect right to do as far as everybody, and particularly third parties, were concerned, until their successors were properly elected or chosen. These officers make a contract with Rauer under which they were to receive the profit, if any, otherwise nothing. Rauer loses, and the Trustee comes in a year and a half afterwards and repudiates the

contract, and wants to charge Rauer rent for the equipment. But he is equally as late in making any move in the Federal Construction Co. job, and because there is a profit, he concludes a year and a half afterwards, after all the risks have been run and the profits made, to declare himself in on all the profits by, at that late day, repudiating the assignment to Rauer by the Sunset Construction Co. of the Federal Construction Co. contract. Is this justice? Is this right? Is this in accordance with any principle of equity ever enunciated?

Such a situation only emphasizes the more the fallacy of the theory that the corporation was *ipso facto* thrown into insolvency. The Bankruptcy Act provides for insolvency proceedings in the case of corporations directly; and no indirect act is tantamount thereto or can take the place thereof.

But again accepting for the sake of argument the Master's position, we will point out the inconsistencies in the Master's findings even therewith:

Previous to February 19, 1915, Sunset Construction Co. was using 3 sand machines, for which Rauer was paying to Edward E. Ball et al. \$100 per month rental for the use of the patent. August 15, 1916, Mr. Rauer bought this patent from Mr. Ball et al., and on the same day had an agreement with Buckman wherein the latter obtained an option to purchase the patent for these machines. But Buckman never consummated this option, so the matter of the 3 sand machines stands in this position: The Sunset Construction Co. was obligated for the rent of the patents at \$100.00 per month,

payable to A. E. Ball et al. until Aug. 15, 1916, and thereafter to Mr. Rauer. This \$100.00 per month is about $\frac{1}{4}$ of the \$375.00 fixed by the Master as the reasonable monthly rental of the whole equipment. [94]

The Master holds that Mr. Rauer gave Buckman an option to purchase the equipment. This is a mistake. The option is in writing and is in evidence, and only relates to the patents of the sand machine. The full equipment was inventoried December 5, 1916, by W. A. Clark, John Jardine and M. R. Mackall, at \$4,934.60.

The total rentals charged against Rauer are:
For the time he used it on his

contract	\$1,312.50
For rentals collected from others	2,461.13

\$3,773.113

Less $\frac{1}{4}$ for rental of patent

rights	943.28	\$2,829.85
--------------	--------	------------

And taking from this the cost

of repairs	2,066.68
------------------	----------

Leaves the net balance..... 763.17

For, to put the equipment in

shape so it could be used at

all, Mr. Rauer expended....	\$2,066.68
-----------------------------	------------

The Master holds Mr. Rauer is not entitled to this because a mortgage can only store the property, —he is not entitled to use it or repair it. If the

Trustee is to get the rental, the benefit of its use, he must by every rule of logic, law, and reason pay or allow for the repairing of the property that permits it to be thus used.

Furthermore, the repair of the property certainly preserved and enhanced its value; and when mortgaged property is sold under foreclosure this added value insures a greater price, which greater price is credited on the obligations of the mortgagor. The mortgagor is the person who gets the value of these repairs in either case; and he who receives the benefits should pay the price.

Furthermore, the taking of possession by a mortgagee under a mortgage clause which permits this, is not an adverse taking, but, instead, one directly in response to the contract; so are the subsequent foreclosure proceedings and sale—all arising out of the contractual relations of the parties, the same as a direct sale would have been. At no time was Mr. Rauer's possession adverse, and certainly every principle of fair dealing would dictate that he be allowed for his repairs and betterments. These repairs and betterments amounted to \$2,066.68.

But the \$2,461.13 rentals Mr. Rauer collected from others, he [95] collected under a contract made by him with the Sunset Construction Co., through its regularly constituted and functioning officials under the terms of which contract Rauer was to give the company credit on his current advances to the company; and this he did; and he had a right to give this credit against any current bills; and he should not now be again charged with it or be com-

pelled to give another credit against the balances outstanding on Feb. 19, 1915. This all happened after that date. None of these so-called rentals are chargeable against Mr. Rauer otherwise than he has already charged them in his accounts after Feb. 19, 1915.

Pages 25-31. Federal Construction Co. contracts.

These were contracts between the Federal Construction Co. and the Sunset Construction Co. The Sunset Construction Co.'s part was in writing assigned to Mr. Rauer on January 25, 1915, by the Sunset Construction Co. through its regularly functioning officers. By the terms of this assignment Mr. Rauer was to carry through the contracts, advance necessary moneys, and credit the Sunset Construction Company with the net profits, after the payment to Rauer of $1\frac{1}{2}\%$ a month on his advances, which credits were to be made on its current account with him; the Sunset Construction Co. also agreeing to furnish the services of Buckman as superintendent, for which the Sunset would pay Buckman. Work under these contracts was not begun until March, 1915, and it was not completed until 16 months thereafter; and never during any of this time did the Trustee assert his right as majority stockholder in the Sunset Construction Co. to change the officers of that corporation or take charge of its business. But he waited not only until the contracts were fully completed, but also the moneys collected by Mr. Rauer and the net profits thereof by him properly applied upon the current account.

[96]

These contracts were assigned to Mr. Rauer before Buckman filed his petition; and can it be seriously contended that in December, 1914, or January, 1915, the officers of the Sunset Construction Co. were affected by a petition which Buckman might file in February, 1915, so that they or the corporation could not function? The absurdity of the proposition supplies its refutation.

The Sunset Construction Co. had a perfect right to make these contracts with the Federal in December, 1914; it had a perfect right to assign them to Rauer in January, 1915, and Mr. Rauer has a perfect right to enjoy the full fruits thereof in accordance with the terms of the assignment contract; and having accounted to the Sunset Construction Co. for the net profits by crediting the same on his current account, he should not now be forced to either pay it over again by giving it to the Trustee, or to apply it over again by charging it against the account previous to February 19th.

One of the elements of these contracts was the services of Buckman. The Trustee could not have compelled these—was not entitled to them—except as he could control the business of the Sunset Construction Co. through the agency of his ownership of the Buckman stock—and then only as the corporation, and in the fulfillment of its contracts.

Again: In the performance of these contracts the Sunset Construction Co. was represented by Buckman, its manager, and Buckman himself collected \$2,212.78 of the moneys payable thereunder in checks made out to the Sunset Construction Co.

by the Federal, and except as he used these moneys he received no pay for his services.

But in accordance with the Master's report these contracts belong to Buckman's trustee, and Rauer must account to this Trustee for all the moneys Rauer collected. If they *ipso facto* and entirely belonged to Buckman's trustee, and not to the Sunset Construction Co., and Rauer's rights to execute them had thereby terminated, and the Trustee could wait 1½ years and then declare himself in, then it might follow that Rauer wrongfully holds the moneys that came into his hands; but would he also wrongfully hold the moneys in his hands that didn't come into his hands? The Master so holds in his report, for he says, Rauer must also pay over [97] the moneys that came into Buckman's hands, that Buckman himself collected, and which were never paid over to Mr. Rauer. Mr. Rauer, according to this, must not only turn over that which rightfully belongs to him, but also that which he never got.

Again, the total payments under these contracts, whether Rauer got them or the Sunset or Buckman got them, are charged against Rauer, and the only thing that is given back to him is the actual money and team hire Rauer himself advanced to pull these contracts through, some \$7,395.97, and he is denied credit for a \$350.00 payment to H. M. Anthony for making the collection for the Federal, and \$300.00 paid by Rauer for rent for premises where the plant was installed for this work, and he is denied his 1½% per month interest on these advances which he was to receive therefor and for his time in

connection therewith under the terms of the assignment contract; and after all the risks have been run and all the work has been done, and all the moneys collected, the Trustee comes along and declares himself in, a year and a half after the work was started, not only for the profits, but for the full receipts; and he is not satisfied with trying to collect them from the people who got them, but wants to get them all from Rauer, and besides allow Rauer nothing whatever for interest for his risk or his time or for the moneys he paid out for rent of premises for the plant that did the work or for services he was compelled to pay for to make the collections.

All of which only emphasizes the fallacy of the Trustee's position that the Sunset Construction Co.'s existence and functioning as a corporation, and its assignment to Rauer, on January 25, 1915, of its contracts of December, 1914, can be directly affected by Buckman's insolvency on Feb. 19, 1915, and that the filing by Buckman of his individual petition in insolvency amounts to a filing of the corporation's petition in insolvency simply because he happened to be the owner of most of its capital stock.

All the moneys that Mr. Rauer received under these Federal Construction Co. contracts was \$8,409.80 on August 12, 1916, and he is entitled first to his interest out of this at $11\frac{1}{2}\%$ per month for 11 mos. for the \$2000 he advanced on January 15, 1915, which would be.....\$330.00
[98] and on the moneys he paid out for team hire (\$5190.45 bet. Jan. 15, 1915, and May 29, 1916, 16

mos., or an average of 8 mos.), and from May 29th to Aug. 12th (the date of payment) 2½ mos. more, which would amount to\$817.42 and for the rent he paid for place where

plant was installed\$300.00 and for the money paid for collection of the account\$350.00

altogether\$1797.42

The amount received by Mr. Rauer

was\$8,409.80

Taking from this the interest and

amounts paid out.....1,797.42

would leave the net profit on the

Federal Construction Co.

job\$6,612.38

This net profit he was entitled

to apply on the Sunset's cur-

rent account which he did. [99]

It will be remembered that outside of the balance of \$37,734.65 which the Sunset Construction Co. owed Mr. Rauer on February 19, 1915, it owes him for moneys advanced since that date another balance of \$18,614.54 after he has applied the full sums accountable for by him on the Taraval contract, the Fourteenth Avenue contract and the Federal Construction Co. contracts, in exact accordance with the assignment contracts made therefor between Mr. Rauer and the Sunset Construction Co. And having so accounted for and applied the moneys coming from these various contracts, Mr. Rauer

should not be compelled to pay them over again by giving them to the Trustee or crediting them against the balance owing him on February 19, 1915.

If Mr. Rauer be compelled to credit over again the \$2,461.13 rentals for equipment collected by him, this should be reduced by $\frac{1}{4}$, that is to \$1,845.85, because of the use of the patent rights on the sand machines, and the balance would be entirely wiped out by the \$2,066.68 he paid in reconstruction and repairs. And surely Mr. Rauer should not be charged with a $3\frac{1}{2}$ months' rental for the Taraval job for which he contracted with the Sunset Construction Co. previous to the insolvency to credit the Sunset with the profits, and there were none, but there was a loss instead. On this latter the Master has charged against Mr. Rauer \$1,312.50, which is therefore not chargeable, although if it were $\frac{1}{4}$ or \$350.00 thereof would have to be deducted therefrom for the use of the sand machine patent rights.

On the Fourteenth Avenue contract the Master charges \$7,323.00 against Mr. Rauer, on the theory first, that the grading contract was performed before Feb. 19, 1915, and therefore was an asset of the insolvent estate; and, second, that the way to ascertain what portions of Rauer's collections was for grading was to figure the amount of checks dated prior to Feb. 19, 1915, that Rauer had delivered up on account of these collections on the whole contract which embraced besides the grading, the curbing and paving. We have shown that the actual amount the books and accounts show Rauer collected

on account of the grading does not exceed \$1,234.57, and that that grading contract and the bills therefor had been assigned to Rauer many months before the Buckman insolvency, and therefore belonged to Rauer to be applied against the current account of the Sunset Co. and not against the debts [100] owing by the bankrupt estate (if the theory of the Trustee is correct that everything of the Sunset up to Feb. 19, 1915, *ipso facto* became a part of the insolvent estate). And if Mr. Rauer mistakenly credited these collections, or collections made on his paving contracts or other contracts entered into after Feb. 19, 1915, against the balance owing him on Feb. 19, 1915 (which, if the Trustee is to be consistent with his contention, is the debt of the bankrupt estate), then Rauer was simply mistakenly giving his property to pay the debts the bankrupt estate owed to him. Perhaps the Trustee will now join us in our view that this demonstrates the absurdity of the contention that the corporation is *ipso facto* thrown into bankruptcy, without a direct proceeding by Buckman filing his individual petition.

We have seen similarly that the miscellaneous items charged Mr. Rauer (pp. 21-22 Master's report) in the sum of \$1,707.20, could not amount to more than \$900.00, and that this has been properly credited by Mr. Rauer in accordance with his definite contracts with the Sunset Construction Co. long previous to the date of the insolvency of Buckman.

As to what the real balance owing to Mr. Rauer by the Sunset Construction Co. was on February 19, 1915, and that the \$7500 credit for the mortgage equity wiped out the \$8000 balance on the \$15,000 note, and should not again be charged against Mr. Rauer's balance of February 19, 1915, we think has been shown to a demonstration in the opening pages of this analysis.

The Sunset Construction No. 1 was duly incorporated April 13, 1910. It failed to pay its license tax and lapsed Nov. 30, 1911.

Thereupon the Sunset Construction Co. No. 2 was duly incorporated Dec. 12, 1911, and immediately started to function, and continued to so function until the end of Mr. Rauer's dealings with it. There has been some claim that its stock certificates were not in the regular form; but it has been repeatedly held by the Courts that a subscription to the stock makes a person a stockholder, and [101] that no certificates of stock need be issued to make the subscriber a stockholder, and that a subscription made in contemplation of the organization of a corporation may be enforced by the corporation after it is organized, and that this puts the corporation in the position of having stockholders the instant the copy of its Articles is filed by the Secretary of State.

(See Clarke on California Corporations, pp. 34, 35, and the many cases there cited.)

And even where there is a question of due organization (which there is not here) it has been held that it does not necessarily result in a partner-

ship or a joint stock company, but usually in a *de facto* corporation.

Supra, pp. 64, 65, and cases cited.
and on the same page:

“If the corporation claims in good faith to be legally incorporated and is doing business, it is sufficient.”

“A corporation *de facto* may legally do and perform every act and thing which the same entity could do or perform were it a *de jure* corporation. As to all the world except the paramount authority under which it acts and from which it receives its charter, it occupies the same position as though in all respects valid, and even against the state except in direct proceedings to arrest its usurpation of power, it is submitted its acts are to be treated as efficacious.”

And again, *supra*, pp. 68, 69, and cases cited: .

“What is a corporation *de facto*? It exists when a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs to some extent, at least, by the methods and through the officers usually employed by corporations; have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body. *Quo warranto* is the proper and only proceeding to test the right to a franchise to exist, or to procure a judgment of its forfeiture.”

The Trustee here seeks the benefits of the contracts made by the corporation and its officers.

Again, *supra*, p. 66: [102]

“A party who has had the benefit of a contract with a corporation cannot question either its *de jure* or *de facto* existence.”

The Trustee in his scramble to upset the facts in this case, may wish to say that since the filing of Buckman's petition on February 19, 1915, vested the ownership of the Buckman stock in the Trustee, and that Buckman thereby ceased to be a stockholder, he could no longer function as a director and officer. In this too, the Trustee would be mistaken; for, let alone the Trustee's failure for a year and a half to assert his ownership and right to control, and his consequent acquiescence in the acts of the officers and agents of the corporation and holding them out as such, it has been held that

“A director who ceases to be a stockholder during his term, but continues to act, is a *de facto* director until he is ousted in a direct proceeding for that purpose, and his acts are valid as to third persons; and a director holding over is a *de facto* director.”

(See Clarke on California Corporations, p. 221 and cases cited.)

The Trustee claims the benefits of the acts of the Sunset Construction Co. and its officers prior to Feb. 19, 1915; and for that reason alone he could not question its existence, or the acts or rights of its officers up to that date. And for the other reasons

stated above he cannot question the corporation's existence or the acts of its officers or their right to act as such after Feb. 19, 1915, and until the end of Mr. Rauer's dealings, with it and them.

Respectfully submitted,

H. M. ANTHONY,

Humboldt Bank Bldg., S. F.

GRANT & ZIMDARS,

1212 Merchants National Bank Bldg., S. F.

[Endorsed]: Filed Aug. 27, 1921. H. M. W.,
Sp. M. Filed Dec. 12, 1921. W. B. Maling, Clerk.
By J. A. Schaertzer, Deputy Clerk. [103]

(Title of Court and Cause.)

Special Master's Petition for Compensation.

The petition of H. M. Wright, formerly standing Master in Chancery and later Special Master in Chancery of this Court, respectfully shows:

By the interlocutory decree herein an accounting was ordered by the undersigned as Standing Master of this Court and upon my resignation as Standing Master, the order of reference was continued to me as Special Master and my report was filed on December 12, 1921. No compensation has been paid to the Master and no order made in regard thereto.

With regard to time employed, the matter was pending before me for a period of about four (4) years, during which time testimony was taken originally and again after reopening for that purpose. Several arguments were had and a large

number of briefs filed. In all, the transcript of the proceedings before the Master covered 523 pages and this, with thirty-five pages of proceedings before the Court was read and 457 pages of briefs and arguments, a total of 1026 pages. The solid time employed was 12 days in taking testimony and 30 days in making the report, a total of 42 days.

With respect to the amount involved, the plaintiff, Trustee in Bankruptcy, claimed that there was owed to the bankrupt estate by J. J. Rauer approximately \$32,000.00, and on the contrary the defendant Rauer claimed that there was due to him from the estate the sum of about \$38,000.00, so that the amount involved can be considered to be \$70,000.00. The report finds, speaking from memory, that there is due the estate from Rauer about \$9,000.00 and due Rauer from the estate about \$13,000.00.

With respect to the difficulty of the reference I state [104] that, without qualification, this reference presented more difficulty of determination than any other reference, even those that took longer to present and determine, in an experience of eleven years as Master of this court. There were numerous difficult questions of law, but above all was the difficulty in determining the facts from the evidence submitted to me. This evidence consisted not merely of the written testimony, but of a great number of books of account, books of reference, checks, slips of paper, contracts and memoranda of all sorts. The transcript of testimony is difficult to follow, the books of account were un-

skilfully and incompletely kept. The fault of this in inadequate presentation of the evidence must be laid at the door of the defendant Rauer, though I do not believe that it was intentional on his part. Inevitably this resulted in longer and harder work on the part of the Master in completing the report.

Under all the circumstances, the Master believes and represents that a just compensation for his services would be the sum of Five Thousand (5,000) Dollars and that said sum would be reasonable; that a minimum compensation would be Forty-two Hundred (4200) Dollars. With respect to the party against whom it is charged, it is apparent that the usual practice of this Court should be followed and that it should be charged against the accounting party, namely the defendant, J. J. Rauer. The justice of following the usual practice is apparent when it is considered that the Trustee in Bankruptcy is understood to have no funds in possession and the amount found due to him from the defendant Rauer ought not to be depleted to the loss of the creditors in bankruptcy.

WHEREFORE, petitioner prays that this Court make its order fixing Master's compensation in the sum of Five Thousand [105] (5000) Dollars; that the amount to be paid by defendant J. J. Rauer, within ten (10) days from date of the order.

Respectfully submitted,
H. M. WRIGHT,
Special Master.

[Endorsed]: Filed Jany. 11, 1922. Walter B. Maling, Clerk. [106]

In the Southern Division of the United States District Court, in and for the Northern District of California.

IN EQUITY—No. 233.

GEORGE J. HATFIELD, Trustee in Bankruptcy
of the Estate of A. E. Buckman, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, Bankrupt, J. J. BAUER, WM.
H. CHAPMAN, FILMORE BUCKMAN, J. A.
MEADOWS, and SUNSET CONSTRUCTION
COMPANY, a Corporation,

Defendants.

Objection to Special Master's Petition for Compensation.

To the Honorable Judge of the United States District Court:

Comes now the defendant J. J. Rauer and files the following objections to the petition of the Special Master for compensation, and which petition was filed herein, and a copy served upon this defendant January 10, 1922, viz.:

The Master states that he has spent 12 days in taking testimony and 30 days in giving consideration thereto and making his report, or a total of 42 days, and he asks therefor compensation in the sum of Five Thousand Dollars (\$5,000) and he asks that his compensation be charged against defendant J. J. Rauer.

Defendant J. J. Rauer objects both to the extent of said compensation, and to the same, or any part thereof, being charged against him, and in that respect represents as follows:

That it appears from this defendant's objections to the Master's report herein referred to, and from said report and the testimony [107] in said matter, and from the order of reference herein, that this defendant was dealing solely and alone with the Sunset Construction Company, which was, at all the times that this defendant was dealing with it, a duly incorporated and organized and existing and functioning corporation, of which the bankrupt A. E. Buckman owned all the stock, except the qualifying stock to the other directors.

That said corporation has never been declared a bankrupt, and no bankruptcy proceedings have ever been initiated against it.

That said corporation owed to this defendant at the time of the bankruptcy of said A. E. Buckman, large sums of money, stated by him to be in excess of Thirty-six Thousand Dollars (\$36,000), which even the Master finds were at said time in excess of Eighteen Thousand Dollars (\$18,000); and that in this defendant's subsequent dealings with said Sunset Construction Company said corporation became indebted to him to the extent of over Eighteen Thousand Dollars (\$18,000) more, and is so indebted to him at the present time in excess of the sum of Thirty-six Thousand Dollars (\$36,000).

That the Master refused to take into account this defendant's account with said corporation, except up to the date of said Buckman's adjudication as a bankrupt, and took the position that since said Buckman was the owner of practically all of the capital stock of said corporation, that therefore the application by this defendant of his subsequent receipts from the corporation upon this defendant's debts, should not be permitted, but that the corporation's money, which it had so permitted him to apply upon the corporation's debt to him, should be paid over by this defendant to the trustee in insolvency of A. E. Buckman, and these receipts the Master states amounted to the sum of Thirteen Thousand Twenty-three and 19/100 Dollars (\$13,023.19).

This defendant further represents that according to the evidence, and even according to the Master's report, this defendant's dealings with said corporation were in the full belief that he had the right to deal [108] with said corporation as a separate entity unaffected by the insolvency proceedings against A. E. Buckman personally, and that his dealings with said corporation were fair and above board, and that he paid value to this corporation for everything that he received from it, and, in fact, said corporation is at the present time indebted to him in excess of \$36,000, even after the application of all he received from said corporation.

This defendant further represents that the Master's statement that the amount involved in this

litigation was \$70,000 is misleading. That it is true the trustee in bankruptcy made the claim that there was approximately \$32,000 owing by this defendant to the trustee of Buckman on account of this defendant's dealings with said corporation, but that the evidence shows that there is not a single cent owing from this defendant to said trustee, and that this even appears from the facts found by the Master; and that the evidence further shows that a serious injustice would be inflicted upon this defendant were the Master's conclusions and his petition herein given effect.

This defendant further represents that none of the creditors who have filed their claims in the above proceedings were creditors of, or in any manner connected with the transactions of the Sunset Construction Company; and that no notice was ever given to creditors of the Sunset Construction Company to file their claims herein, and that creditors of the Sunset Construction Company were never considered in these proceedings as creditors of Buckman; and that this defendant is a creditor of the Sunset Construction Company to the extent of over \$36,000, even after applying upon the indebtedness all the moneys received from the Sunset Construction Company, and that even according to the Master's report the total assets of the Sunset Construction Company were only \$13,023.19, and that \$9016.99 of this consists of rentals charged by the Master against defendant Rauer, and which arise out of this defendant's use of the very property that was mortgaged

to him as security for his \$36,000 balance, [109] and which personal property only sold for \$3701.22 and which \$3701.22 although belonging to this defendant, is impounded in this court in this action, and that this matter never involved \$70,000, but at most \$13,023.19.

And this defendant further represents that the claim here made by the Master for \$5000 compensation for 42 days' services is out of all proportion and reason; and that the highest paid judges of the Superior Court in the State of California only receive a salary of \$6000 a year for which they give at least 300 days' service in the year, or at the rate of \$20 per day, which for 42 days would be only \$840, and that the great majority of the Superior Court judges of the State only receive \$4000 per year, or at the rate of \$13 $\frac{1}{3}$ per day, which for 42 days would be only \$560; that the judges of the Supreme Court of the State of California only receive a salary of \$8000 a year, for which they give at least 300 days' services a year, or at the rate of \$26 $\frac{2}{3}$ per day, which for 42 days would be only \$1120.

That previous to the filing of the Master's petition herein asking for \$5000 compensation and for its charge against and immediate collection from this defendant, this defendant and his counsel were astounded at the Master's repeated reiteration of the great difficulties encountered by him in the making of his report and at his conclusions therein.

That the Master has entirely misconceived the meaning of the decree of reference, and has as a

consequence done unnecessary work, and that the evidence demonstrates that a week's time by a competent accountant would have sufficed to determine the status of the accounts.

And this defendant represents that the said order of reference is not yet final, and that therefore no order for immediate payment against this defendant could be made, as requested; and that the Master's petition for the charge of his compensation against this defendant proceeds upon the assumption that his report is already the judgment of this Court, whereas until final judgment is entered herein an order charging compensation against a party would have no foundation.

And this defendant further represents that the said exceptions and objections to said report, a copy of which is hereunto appended and made [110] a part hereof, are now pending before this court and undetermined, and that no charge should be made against any defendant until it is definitely determined that there is money owing from such defendant in favor of the party bringing the action; and this defendant verily believes that upon a consideration by this Court of this defendant's said exceptions and objections, the justice of this defendant's contention will be recognized by this Honorable Court and the conclusions of the Master will be overruled and set aside and not adopted as the judgment of this Court; and that the judgment of this Court will be that it appears even from the facts as found by

the Master that this defendant owes nothing to the plaintiff trustee for said A. E. Buckman, bankrupt, and that this defendant owes nothing to the Sunset Construction Company, but that instead the Sunset Construction Company is indebted to this defendant in excess of \$36,000 (which in itself will be a total loss to this defendant). That according to the Master's report said corporation owed this defendant \$18,746.22 on February 19, 1915, and the moneys he has received from it since amount to \$13,023.19.

It is submitted that the request for \$5,000 compensation asked for by the Master is most unreasonable; that the Master's report shows that Rauer has acted in good faith in all his dealings, and the liability which is fastened upon him by the Master is upon a technical construction of the law, and in no wise charges Rauer with intentional wrongdoing. That concededly according to the report, Rauer suffers a very great loss in any event; that the report shows that there are no assets of any kind pertaining to the bankrupt estate, other than the property right involved in this litigation; that there can be no recovery by Rauer of any of the costs or expenses of this litigation should it be finally determined that Rauer, instead of being liable to account, is entitled to a judgment against the plaintiff; that Rauer has already been to a very large expense, and the plaintiff, as trustee of a bankrupt estate, is under no liability to reimburse him for his [111] costs or outlays, except to the extent of assets that may come into

his hands,—and, as before stated, there are no assets apart from the sum that may possibly be recovered from Rauer in this present litigation.

It appears from the Master's report that his request for the \$5000 compensation is based upon his report that the defendant Rauer is liable to account; that the Master would not have made the request for the \$5000 compensation if his judgment had been in favor of Rauer and against the plaintiff.

While we disavow any thought of charging the Master with being consciously affected by the foregoing facts and by the circumstances that from Rauer alone could a fund be derived out of which the Master could be paid, yet, it is respectfully submitted that the foregoing matters, developing as they do a most delicate situation, should be taken into consideration by this court in ruling upon this matter of the Master's compensation.

WHEREFORE, this defendant prays that in fixing the compensation of the Master this Court take into consideration the matters and things here called to its attention, and that no portion of said compensation be charged against this defendant.

H. M. ANTHONY,
GRANT & ZIMDARS. [112]

In the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

No. 233—IN EQUITY.

GEORGE J. HATFIELD, Trustee in Bankruptcy
of A. E. Buckman, Bankrupt,

Plaintiff,

vs.

A. E. BUCKMAN, J. J. RAUER, WM. B. CHAP-
MAN, FILMORE BUCKMAN, JOHN DOE
MEADOWS, and SUNSET CONSTRUC-
TION COMPANY, a Corporation,

Defendants.

**Exceptions of Defendant J. J. Rauer to Master's
Report.**

Comes now the defendant J. J. Rauer, and makes and files the following exceptions and objections to the report and the supplemental report of H. M. Wright, Esq., Standing and Special Master in Chancery, filed herein on December 12, 1921; the time for the filing of these exceptions and objections having been extended by stipulation and order of Court thereon to January 25, 1922.

To make clear these exceptions and objections there is made the following brief statement of the admitted and underlying facts appearing from the pleadings, files and records in this matter, and which pertain to all the exceptions and objections here stated, viz.:

That the bill of complaint filed herein December 1, 1915, alleges that "the defendant Sunset Construction Company is a corporation organized and existing under the laws of the State of [113] California," and "was organized as a corporation under the laws of the State of California on the 12th day of December, 1911"; and that "A. E. Buckman immediately became the owner of all the outstanding subscribed shares of the capital stock of said corporation with the exception of two shares, one each to defendant W. H. Chapman and one to J. Maury," and "that defendant W. H. Chapman is, and has been since the formation of said Sunset Construction Company, the president thereof, and defendant Filmore Buckman is, and has been since the formation of said corporation, the secretary thereof." These facts stand admitted.

That defendant A. E. Buckman was, on February 19, 1915, declared a bankrupt in a proceeding therefor voluntarily commenced by said A. E. Buckman.

That no proceedings in bankruptcy have ever been taken or initiated against the defendant Sunset Construction Company, and as found in the Master's report (lines 18 to 20, page 38) "the company was never declared a bankrupt, and its creditors have not been scheduled and notified to file their claims."

That defendant Rauer lent moneys to defendant Sunset Construction Company since its organization on December 12, 1911, and until August 1916, and took as evidences of said indebtedness from said corporation its promissory notes and checks, and

from time to time received from said corporation payments thereon and assignments of its contracts and accounts as payments thereon, and also on the 16th day of June, 1914, received from said corporation its chattel mortgage, mortgaging to him all of the personal property of said corporation as security for two promissory notes aggregating \$15,000.00, and other indebtedness. That after the giving of said promissory notes the only evidences of loans to it taken by defendant Rauer were the checks of the company, upon the understanding that he would hold them till the company had funds to meet them; [114] and as funds were forthcoming, he would deliver up these checks.

That defendant A. E. Buckman continued as manager of defendant Sunset Construction Company after his adjudication as a bankrupt on February 19, 1915, just as he had theretofore; and there was no change in the conduct of the business of said Sunset Construction Company because thereof, said company continuing to be not only a *de facto* but an actual, existing and functioning corporation thereafter and until the end of defendant Rauer's dealings with it.

That defendant Rauer continued to conduct his business with the Sunset Construction Company after February 19, 1915, in just the same way that he had conducted it before, and, as the Master finds (lines 23 and 24, page 38 of the report), defendant Rauer "believed himself entitled to deal with the company after Buckman's bankruptcy as a separate

entity not affected by his (Buckman's) bankruptcy."

That it is alleged in the bill of complaint herein that in January 1914, Buckman transferred his stock in said corporation Sunset Construction Company to J. J. Rauer presumably as a pledge to J. J. Rauer, and that Rauer subsequently transferred it to one Meadows, but that the stock actually belonged to Buckman.

That on the hearing before the District Court, the Court held that the transfer to J. J. Rauer of said stock by way of pledge was ineffectual, and that the stock therefore still belonged to Buckman, and that since the stock belonged to Buckman, it passed to Buckman's trustee in bankruptcy as of the date of his adjudication February 19, 1915; and the defendants herein were thereupon ordered to render accounts of their respective dealings with the Sunset Construction Company, a corporation, and the matter of such accounting was referred to H. M. Wright, Esq., by the District Court. [115]

That defendant Rauer then so rendered his account with said corporation Sunset Construction Company covering the whole period of his dealings with it, showing that said corporation was indebted to him in a large sum of money, and that the only security therefor that defendant Rauer held was the chattel mortgage of said corporation hereinabove referred to and executed on June 14, 1914, and assignments of accounts and contracts of said Sunset Construction Company.

That thereupon, however, defendant Rauer was directed by the Master to segregate his accounts so as to state the balance owing him on February 19, 1915, only, and further to render an account of all moneys he had received in his dealings with the Sunset Construction Company since February 19, 1915, growing out of any contracts of said corporation existing on said date or performed theretofore, and also of all sums received by him since February 19, 1915, for the use or rentals of the property mortgaged to him; and this without taking into account of how he had applied the same or of the moneys he had loaned or advanced to the Sunset Construction Co. since February 19, 1915.

That defendant Rauer thereupon filed herein as directed a segregated statement of his transactions with said Sunset Construction Company showing that the said corporation owed him on February 19, 1915, the sum of \$36,807.04, and that since February 19, 1915, and entirely independent of anything previous to said date, said Sunset Construction Company was further indebted to him, after giving it credit for all moneys received, in the sum of \$18,561.54. But, according to the Master's decision, defendant Rauer is not entitled to credit against the moneys owing him on February 19, 1915, or against the sums loaned or advanced by him to Sunset Construction Company since February 19, 1915, any moneys received by him since February 19, 1915.

The Master has found that defendant Rauer received sums [116] aggregating \$4,016.20 repre-

senting moneys earned by the Sunset Construction Company previous to February 19, 1915. This defendant Rauer disputed and claims that all but \$1,395.00 of these particular moneys so specified by the Master were earned after February 19, 1915, and were applied by him upon his account with the Sunset Construction Company.

The Master has also found that defendant Rauer received after February 19, 1915, sums aggregating \$9,006.99 as the result of the use and rental of the equipment mortgaged to defendant Rauer after February 19, 1915.

That the full amount of these sums so found by the Master to have been received by defendant Rauer from the Sunset Construction Company since February 19, 1915, is the sum of \$13,023.19.

Defendant Rauer represents that he did receive certain moneys since February 19, 1915, resulting from the use and the rentals of said personal property mortgaged to him, and that he had applied these sums both upon the repayment of moneys advanced to the Sunset Construction Company by him previous to February 19, 1915, and moneys advanced and loaned to it by him subsequent to February 19, 1915, and in reimbursement to himself of moneys expended by him in rebuilding and repairing and paying royalties on the very property with which he earned these rentals, but none of which moneys he is, according to the Master's recommendation permitted to apply or retain.

The Master further found that the Sunset Construction Company owed defendant Rauer on Feb-

ruary 19, 1915, the sum of \$18,746.22, and that the same has not been paid, and that defendant Rauer has not the right to offset said \$13,023.19 charged by the Master to have been so received by him since February 19, 1915, against said \$18,746.22 even though he was dealing with said corporation [117] Sunset Construction Company during said entire time as a separate entity unaffected by the Buckman bankruptcy proceedings, and even though, as a matter of fact, no bankruptcy proceedings had ever been instituted against said corporation, and it was an actual, existing and functioning corporation, and even though, as found by the Master, defendant Rauer's dealings with the corporation were in good faith and in the full belief that the corporation had an existence as a corporation apart from Buckman, and that he, Rauer, could legally transact business with the corporation, and was in fact dealing with said corporation as such. [118]

EXCEPTION I.

Defendant Rauer therefore excepts to the Master's report that the sum of \$13,023.19 found by the Master to have been received by defendant Rauer from the Sunset Construction Co., a corporation, since February 19, 1915, is payable by him to the plaintiff Trustee in Bankruptcy for A. E. Buckman, and submits that from the face of said finding that there was owing and unpaid to defendant Rauer on February 19, 1915, from the Sunset Construction Co. the sum of \$18,746.22, and that subsequently there has been received by him the sum of \$13,023.19 out of the assets of the Sunset Construc-

tion Company, it follows that there is nothing owing from defendant Rauer either to the Sunset Construction Co. or to Buckman's trustee. But that instead said report on its face shows that there is still owing to defendant Rauer from the Sunset Construction Company the difference between said balance of February 19, 1915,..... \$18,746.22 and said money so found to have been received by defendant Rauer since February 19, 1915, of..... 13,023.19 or the sum of..... \$5,723.03

And defendant Rauer assigns that the conclusion of the Master that said \$13,023.03 received by him from the Sunset Construction Company since Feb. 19, 1915, is not applicable to the debt owing him by that corporation, could only be correct if that corporation had been declared a bankrupt on February 19, 1915, and could not follow merely from Buckman's bankruptcy.

And this defendant further points out that even the Master apparently cannot escape the feeling that an injustice must follow from his deductions, as appears from what might figuratively be termed a *sotto voce* remark of the Master, where he says (p. 38 of his report):

“that Rauer must account to this trustee for [119] dealings with the company's assets owned on February 19, 1915, after that date, without the benefit of set-offs subsequently accruing. There are, of course, difficulties arising out of the fact that the company was never declared a bankrupt, and its creditors have not

been scheduled and notified to file their claims, and *that defendant Rauer will suffer loss by reason of the fact that he believed himself entitled to deal with the company after Buckman's bankruptcy as a separate entity, not affected by his bankruptcy.*"

EXCEPTION II.

Under the interlocutory decree made herein Sept. 11, 1916, defendant Rauer and the other defendants were directed to

"account for all moneys or property received by them from, or advanced by them to, defendant Sunset Construction Company since the 12th day of December, 1911, whether such transactions were made in the names of third persons, or in the names of said parties, for the purpose of determining what claims, if any, exist between said company and said persons."

And defendant Rauer excepts to the ruling of the Master refusing to consider his account of the moneys advanced by him to the Sunset Construction Company and by him expended for it since February 19, 1915, and which said moneys after the full application of the \$13,023.19 (so found by the Master to have been received by defendant Rauer since said date) still leaves a balance owing by the Sunset Construction Co. to defendant Rauer on the transactions subsequent to February 19, 1915, of the sum of..... \$18,561.54 and which said balance, when added to the balance found by the Master to have been owing to defendant Rauer as the

result of transactions previous to February 19, 1915, of..... 18,746.22
shows a total balance owing by said Sunset Construction Co. to defendant Rauer
of the sum of..... \$37,307.76

And defendant Rauer assigns that in this regard the [120] Master's report is also not in accordance with the order of reference and *is not a true statement of the claims as they "exist between said company and said" defendant Rauer.*

EXCEPTION III.

Defendant Rauer excepts to the report and finding of the Master that the indebtedness owing to him from the Sunset Construction Company on February 19, 1915, was only the sum of \$18,746.22; and in this connection defendant Rauer states that the indebtedness owing to him by the Sunset Construction Company was at said time the sum of \$36,807.04, and that this is proven by a vast preponderance of the evidence, by the books of the Sunset Construction Company, by the accounts furnished by defendant Rauer and by the testimony offered upon said matter. And that the Master has entirely disregarded each and every account furnished by defendant Rauer and of testimony offered, and has taken as the sole basis for said figure of \$18,746.22 a petition filed by this defendant in a matter entirely disconnected with the matter of this accounting, viz.: a petition for the sale of the personal property mortgaged to secure this defendant's advances to said Sunset Construction Company, and in which said petition the figure (\$26,246.22) which

is taken by the Master as the basis for this finding was mentioned as being the amount at said time of the balance owing to this defendant from the Sunset Construction Company upon *all the accounts secured by said chattel mortgage*; and that nevertheless, though the Master gives this statement in said petition as to the sum owing an overriding effect over all accounts and testimony, yet he entirely disregards the further qualifying recital in said petition that "said sum is [121] secured by the chattel mortgage hereinabove mentioned," and to further reduce the balance so shown to be owing to defendant Rauer he deducts therefrom the sum of \$7,500.00, which said \$7,500.00 was a balance secured by a *real estate mortgage* which was the subject of a separate and independent account and had theretofore been liquidated by defendant Rauer taking the equity of the real property mortgaged in full payment thereof; and that therefore, even taking said figure as the basis for the balance of the account owing to defendant Rauer by said Sunset Construction Company on February 19, 1915, the said balance so found by the Master as \$18,746.22 should be increased by \$7,500.00 and should have been stated as the sum of \$26,246.22 as owing to defendant Rauer from the Sunset Construction Company on February 19, 1915. His accounts carefully prepared and subsequently rendered and filed herein show the balance to be owing him from Sunset Construction Co. on said date to be \$36,807.04.

EXCEPTION IV.

Defendant Rauer excepts to the Master's finding

that he is accountable for and must pay to Buckman's trustee the following sums received from the Sunset Construction Co., and which the Master charges against him upon the theory that they are the collections by defendant Rauer of assets of the corporation existing on February 19, 1915, and for which defendant Rauer gave no present consideration, but which were applied by him upon his general accounts, viz.:

1915.

Mar. 11	1	City Warrant....	\$495.00
May 31		Check of Hyman...	750.00
" 24	" "	" " " ...	250.00
" 25	" "	Dufau....	20.00
" 25	" "	Ryder....	245.00
" 25	" "	H. Meyer...	649.00

[122]

\$2,409.00

Miscellaneous collections (report
pp. 22 and 47), consisting of:

Academy of Sciences.....	\$300.00
Reeder & Foster.....	407.20
Bosworth	400.00
Iverson	500.00

1,607.20

\$4,016.20

As to the following items included in the above,
viz.:

March 11, 1915, One City Warrant.....	495.00
Bosworth.....	400.00
Iverson.....	500.00

These arose out of work completed by the Sunset Construction Company previous to February 19, 1915, and these accounts were assigned to defendant Rauer, whether before or after February 19, 1915, does not appear from the evidence, but they were collected by defendant Rauer after February 19, 1915; and defendant Rauer excepts to the Master's report charging these against him, for the reason urged in Exception I, to the effect that the Sunset Construction Company has not been declared a bankrupt and that he has given full credit for these collections upon the account of the Sunset Construction Company with him and should not be required to pay these sums to Buckman's Trustee; and for the reason that it does not appear that the assignments made to him were made after February 19, 1915; and also because, in the hearings had nearly five years after the event, when vouchers and books and memory had grown dim, and where hundreds of items were in evidence, and only for the few here mentioned defendant Rauer and the other witnesses and Mr. Rauer's and the Sunset Construction Company's accounts and books do not show the present consideration given by this defendant, that the presumption must nevertheless be indulged that, since as to all these hundreds of other items where they are not direct credits on the account this present consideration does appear, that therefore this was the [123] practice as to all. Yet this presumption was given no consideration by the Master, though the burden of proof is on the plaintiff trustee.

As to items:

May 31st	Check of Hyman for.....	\$750.00
" 24th	" " " " "	250.00

On page 45, lines 25 to 30, the Master concludes that these checks received by defendant Rauer were payments by Hyman & Sons on account of a grading job done by the Sunset Construction Company previous to February 19, 1915, and this from the fact that bill No. 2239 sent by the Sunset Construction Company to O. Hyman & Sons was for the amount of \$1000.00, and that this bill, introduced by plaintiff, was not receipted.

Filmore Buckman, secretary of the Sunset Construction Company, testified relative to the collections on this grading job from Hyman & Sons and others (p. 401 of the testimony) that this grading was commenced on April 28, 1914, and finished on January 22, 1915, and that Mr. Rauer had nothing to do with any part of it and the Company had never assigned any part of it for collection, except the City's portion, which had been assigned to Mr. Rauer, and as to this, he says—"When the city portion was due, of course, that ran into 1915, but the bills were assigned to Mr. Rauer and collected by us; that is, the **14th Avenue bill.**"

On page 402 it appears from the testimony of the same witness that the paving job of the same portion of the street was immediately afterwards, March 26, 1915, let to Mr. Rauer who completed that job himself, hiring the Federal Construction Company to do it, and that Mr. Rauer sublet all the remainder [124] of the work that they had not done, which included the paving and some grading

of the street, and Mr. Rauer collected that for himself. This job was finished April 26, 1915, and accepted May 10, 1915. It also appears from the testimony, as well as from the Master's report, that the parties for whom the grading was done by the Sunset Construction Company and the parties for whom the paving was done by Mr. Rauer were practically the same parties, from which it would follow that the mere fact that the names of those who paid Mr. Rauer for paving correspond with the names of those who owed the Sunset Construction Company for grading does not prove that Mr. Rauer collected the Sunset Construction Company's grading bills, but simply shows that he collected his own bills.

Hyman's testimony shows (p. 456) that the payments made by him in May and June 1915 were on a different contract from those made to the Sunset Construction Company for grading; and it appears from the ledger account of Hyman, introduced in evidence by the plaintiff, that the grading job done by the Sunset Construction Company was for grading lots, and that the paving and curbing job, which is the other contract Hyman refers to, was for paving the streets and the little incidental grading connected therewith, upon a contract, the permit for which was issued to one Moran in May 1915, and by Moran assigned to Rauer.

Referring to the ledger sheets of Hyman, Oscar Hyman testified (pp. 463 and 484) as follows:

"Q. Now on this sheet marked 'Street Work' will you notice an item May 21 and another item May 24, to J. J. Rauer.

A. Yes.

Q. One item \$750 and the other \$250. Now these items were paid to Mr. Rauer?

A. Yes.

Q. On those dates?

A. Yes; that is our check register.

Q. They have no reference to this grading work, have they? A. No.

Q. That was for some other work?

A. We entered into a [125] contract for paving and sewerage and curbing of 14th Avenue; that is represented here in this.

Q. That would be this separate sheet here?

A. Yes.

Q. So that you would change your testimony of this morning in that respect? A. Yes.

The MASTER.—This separate sheet here means nothing in the record.

Mr. ANTHONY.—I am referring here by 'this separate sheet' to the sheet taken from the ledger account of Mr. Hyman pertaining to Outside Land Block 297 and marked 'Street Work Account,' and there is a reference on this in writing, Moran and Sunset Construction Company. A. Yes.

Q. That would refer to a separate contract, would it?

A. Moran had the original contract for that work."

During Defendant Rauer's testimony, the Master stated as follows:

"The MASTER.—But this does not prove that. This proved that on May 21, 1915, he re-

ceived \$750.00 from Heyman and on the 24th he received \$250.00. But does this prove that it was paving? It does not say so.

Mr. ANTHONY.—That is, Mr. Rauer identifies that as a portion of 14th Avenue job that he had something to do with, and pertains exclusively to paving.

Mr. WILLIAMS.—It corresponds also to the items that were put in the list of Mr. Heyman, wherein he puts in May 21, \$750, and there was another item of May 24, \$250.

The MASTER.—Yes, but I do not see that it goes beyond that. It amounts to nothing more than saying, that these items were not grading, they were paving. What does this prove?"

It should be borne in mind in this connection that this hearing was in March 1920; that there were no records introduced or extant absolutely identifying the character of these payments made to Mr. Rauer five years before, and that the burden of proof was on the plaintiff, the Trustee for Buckman; and it would seem in all reason that the only presumption that can be indulged from the fact that the payment of this \$750.00 and \$250.00 were made to Mr. Rauer is, particularly so since Mr. Rauer himself had a contract with these people, that it was in payment for Mr. Rauer's bill for paving and not in payment of the Sunset Construction [126] Company's bill for grading; and Mr. Rauer testifies that this is the fact.

The items in the contract to Moran, assigned to Mr. Rauer, for the paving and curbing were as follows:

288 feet curbing at \$1.35 per foot.....	388.80
5760 sq. ft. paving at 26¢ per foot.....	1497.60
Inspection fees.....	28.80

\$1915.20

To this should be added the Baker bill
 which Heyman also paid of..... 210.00

Making a total of Hyman's bill for paving
 and curbing of.....\$2125.20
 Graham received thereon an order for.... 1179.53

Leaving for Mr. Rauer's paving only....\$1045.67

And it is only shown that Mr. Rauer received the two Heyman checks for \$750.00 and \$250.00, or a total of \$1,000.00, showing that he did not even receive the full amount owing him from Heyman.

The Sunset Construction Company's books show that its bill for the grading against Heyman and Baker was only.....\$1409.00
 These books also show collections by the Sunset Construction Company on this account as follows:

Jan. 11, 1915.....	\$300	folio	320
" 22, "	200	"	322
Feb. 6, "	285	"	338
Baker.....	165		

\$950	950.00
-------	--------

\$459.00

If this \$1,000.00 be credited to Sunset Construction Co. grading, it would be overpaid \$541.00, even according to these book entries.

It should be remembered that in this particular transaction Filmore Buckman, who was the Sunset Construction Company's bookkeeper, also sent out the bills and made some of the collections [127] for Mr. Rauer on his paving contract, making out all these bills on the Sunset Construction Company's stationery and then, after having sent the bills in the name of the Sunset Construction Company to the property owners, giving an order in the name of the Sunset on the property owners to Graham for the curbing and to Rauer for the paving,—the Sunset Construction Co. not having done a bit of the work or contributed a cent to it.

In this connection are also concerned the following items:

May 25, Check of Dufau.....	\$ 20.00	..
" " " " H. Meyer.....	649.00	

These the Master found were all payments on the 14th Avenue grading job and that these payments were received by defendant Rauer. Filmore Buckman, who was the bookkeeper for the Sunset Construction Co. was sending out bills for Mr. Rauer's paving and curbing contracts at the same time and to the same persons that he was sending out bills for the Sunset Construction Co.'s grading job, and was more or less attending to the collections for both parties, as he was collecting from practically the same persons. And the accounts of both the Sunset Construction Co. and Mr. Rauer show that from some of the parties he credited payments to the Sunset Construction Co. for more than the grading bill, and to offset this he gave Mr. Rauer orders to collect grading bills. The following is Mr. Rauer's

account of the collections upon this curbing and paving job, which shows that, taking into account the \$819.52 owing from H. Meyer on the grading job collected by him, Mr. Rauer is still a loser on the 14th Avenue collections of \$40.20 (and he should not be charged with the check of May 25, H. Meyer \$649.00), viz.: [128]

	Charge for Curbing and Paving	Amt. Rec'd by Mr. Rauer or others	Balance Collected and re- tained by Sunset	Excess over- payment bills col- lected by Rauer
Webb	166.25	\$137.50	28.75	
Ryder	319.20	306.70	12.50	
Reva	322.21	322.21		
Babbitt	366.51	366.51		
Maloney	319.20	250.00	69.20	
Katz	207.80	167.50	40.30	
Jordan	157.50	83.65	73.85	
Lathrop	198.75	145.00	53.75	
Gardius	215.93	160.00	55.93	
Salari	198.75	148.81	49.94	
Gets & Sons	1,043.36	1,043.36		
M. Baker	210.00)	(1,179.00		Graham
Hyman	1,969.00)	(1,000.00		Rauer
Dufour	40.00	40.00		

	Charge for Curbing and Paving	Amt. Rec'd by Mr. Rauer or others	Balance Collected and re- tained by Sunset	Excess over- payment bills col- lected by Rauer
Henry Meyer)				
S. Meyer)	2,328.52	\$3,148.04		819.52
C. R. Russell	196.00	195.00	1.00	
Tarpey	336.00	30.25	305.75	
Corking	198.75	30.00	168.75	
	<hr/>	<hr/>	<hr/>	<hr/>
	8,793.73	8,753.53	859.72	
	7,753.53		819.52	
	<hr/>		<hr/>	
Loss to Mr. Rauer	40.20		40.20	

As to the item of May 25th Check of Ryder for \$245.00, the Master finds as follows:

“As regards these matters Ryder in fact paid Rauer \$306.70, of which \$245.00 was the proceeds of a note given by him to the company and turned over to Rauer on February 24, 1915.”

The evidence relating to this matter shows that Ryder did give a note for \$250.00 to the Sunset Construction Co. about this same time; and the Sunset Construction Co.'s small cash book, page 14, shows the following transactions (that the Sunset Construction Company received the proceeds of that note to the amount of \$245 directly from Mr. Rauer, viz.:

“February 24, 1915, Received from J. J.

Rauer check..... \$245.00

Discount on note... 5.00

\$250.00

Assigned to J. J. Rauer note Ryder on 14th

Ave..... \$250.00”

[129]

Defendant Rauer's check-stub No. 1631 in evidence shows that this was Mr. Rauer's own check dated February 27, 1915, to Sunset Construction Company and was paid to the Sunset Construction Co. on that date. In other words, the Sunset Construction Co. on that date received from Mr. Rauer the full value of that note. In other words, Mr. Rauer paid to the Sunset Construction Co. Ryder's note and the Sunset Construction Co. received therefor \$245.00 on February 24, 1915, just the same as if Ryder himself had paid it to the Company; and

yet the Master wants to make Mr. Rauer account to Buckman's Trustee for the subsequent payment of the note by Ryder to Rauer.

As to the Academy of Sciences' \$300.00 payment to Mr. Rauer, the evidence of Filmore Buckman shows (pp. 389, 390) that this job started on July 1, 1915, and ended on July 21, 1915. (Buckman's bankruptcy was February 19, 1915.)

"A. The Sunset Construction Company had a contract with the Academy of Sciences for doing certain work around the Museum out there, and that was completed with the exception of certain back-filling that was to be done after the building was completed. When the time came to complete the contract it cost a great deal more to complete it than the balance retained by the Academy of Sciences. Later on we had to go back and do that work. Then there was a balance, I believe it was \$300 odd, due the Sunset Construction Company on the contract. I think it cost between \$500 and \$600 to complete the work."

And Mr. Rauer's account shows the moneys that Mr. Rauer then presently had expended for this work and for which he got in return only this \$300, to be the following:

Pay-roll	\$298.60
Stock hire	252.00
	<hr/>
	550.60
Amount received	300.00
	<hr/>
Loss to Mr. Rauer	\$250.60

Because Mr. Rauer was paid this \$300 which never would have been [130] paid unless Mr. Rauer advanced the money for the pay-roll and stock hire and finished the job, the Master wants to charge this \$300 against Mr. Rauer in favor of the Trustee of Buckman and not allow Mr. Rauer his credits of \$550.60 against the same, because it happened to be an uncompleted contract from before February 19, 1915.

The item: "Reeder & Foster, \$407.20" is charged against defendant Rauer by the Master on the theory that this payment was for work done by the Sunset Construction Co. previous to February 19, 1915; and in the face of this theory the Master makes this finding with reference to this particular check (report, pp. 47, 48):

"Cash book #2, page 30, shows that on July 6th, the Sunset Construction Company received from Foster & Vogt (which seems to have been another name for Reeder & Foster) *in full for June team hire*, the sum of \$907.20. Page 31 shows that on July 3 there was given to D. F. Cramer an order on Foster and Vogt for \$500 and on July 6th, to J. J. Rauer a like order for \$407.20. This was the bookkeeper's crude method of indicating that Foster & Vogt had paid their bill by signing two orders in the total sum of the amount of the bill. Rauer's statement of account acknowledges the payment."

On the cash-book of the Sunset Construction Company (pages 30 and 31 entries *for July, 1915*) the item appears as follows:

Foster & Vogt (which was another name for Reeder & Foster) in full for <i>June team hire</i>	\$907.20
Paid as follows:	
Stock hire, D. F. Cramer.	\$500.00
Foster & Vogt.....	407.20 907.20

Defendant Rauer calls particular attention to the Master's finding that this was "*in full for June team hire*," and not for any work done prior to February 19, 1915, and, therefore, even on the theory adopted by the Master, it cannot be charged against defendant Rauer in favor of Buckman's trustee. [131]

EXCEPTION V.

Defendant Rauer excepts to the findings of the Master that he must pay Buckman's trustee \$9,-016.99 for the rental and use after Feb. 19, 1915, of the equipment and personal property of the Sunset Construction Company, mortgaged to defendant Rauer, and which the Master stated to consist of the following items (Report pages 48 and 24), viz.:

"January 1916 Rental of equipment on T. Street job	\$1,312.50
Less repairs	148.43

\$1,164.07

Miscellaneous collection of
rentals (Report page 24)
consisting of the follow-
ing:

Hutton, included in statement of account, under date August, 1916..... 927.00

Items not included in account but shown in statement of account rendered

Buckman:

Sept. 10, 1916	\$200
Oct. 14, "	400
Nov. 10, "	400
Dec. 9, "	300

1,300.00

Rent from Morgan Improvement Co. 159.13

Scrap iron sold 75.00

2,461.13

1/2 Federal Construction Co.

payment	5,381.79
---------------	----------

9,006.99

In Exhibit I, hereto attached, defendant Rauer has set forth the following: the jobs on which any of this equipment was employed by defendant Rauer, the time during which it was employed on these various jobs, and the actual part of the equipment that was so employed, and the rental or the value of the use thereof as estimated by plaintiff's own expert witness Simmie, and giving the items thereof in full, which he here recapitulates as follows: [132]

T. St. job April 11, 1916 to July 24, 1916	\$1,088.50
Hutton job, May 10, 1916 to Aug. 14, 1916	681.30
Hutton and Cramer job, Aug. 24, 1916, to Dec. 9, 1916,	794.85
Morgan Imp. Co. job Aug. 24, 1916 to Nov. 16, 1916	102.00
Federal Construction Co. jobs San Bruno and 21st Ave. and B. Sts., April 11, 1915 to July 31, 1915, and July 30, 1915 to Oct. 30, 1915	1,050.00
	<hr/>
	\$3,716.65

From the foregoing it appears that defendant Rauer was using this equipment between April 4, 1915 and October 30, 1915, and between April 11, 1916 and December 9, 1916; and for those periods the Master holds he must account to Buckman's trustee.

Mr. Rauer rendered and introduced his accounts for betterments and repairs covering the period from April 4, 1915 to December 9, 1916, and we attach to these exceptions, marked "Exhibit 2" a copy of this account for repairs and betterments, in which the period of 5½ months between October 30, 1915, and April 11, 1916, during which the equipment was not employed is shown in a separate column.

From common experience, every one that deals with machinery knows that a great deal of repairing is done during the periods of the machinery's unemployment, and it will be noticed that the period

of 5½ months during which this employment did exist was just between the two periods, during which this equipment was very actively employed, and it was therefore receiving the benefits of the repairs and improvements made during this time of unemployment.

From this account for repairs and betterments, it appears that during the period of actual employment, Mr. Rauer expended therefor sums aggregating	\$1,648.22
and during the 5½ months between the times of actual employment	377.74
	<hr/>
a total of	\$2,025.96

[133]

Brought forward	\$2,025.96
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To this should also be added the cost paid by Mr. Rauer for the installation of electricity to the P. G. & E. Co. on the T. St. job, where he deposited. . . . \$499.40 and received a refund of 281.00

	<hr/>
or the difference of	218.40
	<hr/>
	\$2,244.36

It is also in evidence that Mr. Rauer paid during all this time from Feb. 15, 1915, to December, 1916 (22 months) a rental of \$25.00 per month for the block at O. & 20th Sts., where the equipment and all the auxiliaries were stored, and to which it was returned and from which it

was moved to these jobs, and without the facilities of which it could not have been properly employed—the total of this rental was 22 months at \$25.00 per month or 550.00

This makes a total for betterment, repairs and installment and yard rental paid out by Mr. Rauer of \$2,794.36

It is shown in Exhibit 1 hereto attached just what equipment was employed on each particular job, and time thereof, and the actual rental values thereof according to plaintiff's expert Simmie, and the total of those rental values is 3,677.90

The total expenses for repairs, betterments, installation, and yard rent is 2,794.36

Leaving the net rental of the equipment used\$ 883.66

This does not include or take into consideration the \$100.00 per month paid by Mr. Rauer to A. E. Ball (royalty on sand machine patent) for 16 months from April 1915 to Aug. 1916 (which was among the money advanced during that period by Mr. Rauer to the Sunset Construction Co., and concerning which the Master would not listen to an accounting); nor does it take into consideration the same sum due Mr. Rauer for that

royalty for the four months from August, 1916, when he purchased this patent right, to December, 1916, the end of the operations.

But assuming that the question was not, what was the actual value of the rentals for which Mr. Rauer was supposed to account, but that Mr. Rauer was to account for the results of all his contracts for which the equipment formed the basis, then there should still be deducted from the amount as charged against Mr. Rauer by the Master of the following, viz.: \$9,016.99
[134]

Brought forward	\$9,016.99
Repairs, betterments, instal-	
lation and rent of yard	\$2,794.36
Royalty on sand machine patent	
@ \$100 per month for 22 months	2,200.00
	<hr/>
	\$4,994.36

And since the Master, in arriving at the sum of \$9,016.99 has taken the position that Mr. Rauer was accountable (not for the actual rentals), but for the profits on his contracts and his actual collections, then Mr. Rauer should also be allowed to deduct his losses; and on the "T" St. contract he lost \$945.00

And the Master instead
has charged against him
in the \$9,016.99 a rental
for the "T" St. job of .. 1,164.07

Or a total further de-
duction on account of the
"T" St. job of.....\$2,109.07

\$2,109.07

\$7,103.43

There should also be deducted
therefrom the amount derived
from the scrap iron sale, which, as
we have seen, consisted of the
parts replaced and paid for by Mr.
Rauer, and was certainly part of
the property mortgaged to Mr.
Rauer and the proceeds of which
he certainly was entitled to have
applied upon his indebtedness;
and this scrap iron was sold for 75.00

\$7,178.43

which makes a total of deductions
to be made of 7,178.43

Leaving, even adopting the theory
of the Master, only a net rental of \$1,838.56

The equipment belonging to the Sunset Construc-
tion Company (and which consisted of all the Com-
pany's physical property) was mortgaged to de-
fendant Rauer on June 16, 1914, to secure two

promissory notes aggregating \$15,000.00, and also to secure the other indebtedness owing or which might become owing to defendant Rauer from the Sunset Construction Company. The validity of this mortgage is not questioned. [135] The moneys owing on said promissory notes, together with other moneys aggregating a large sum, were due and unpaid on February 19, 1915, and default had been made in the payment almost immediately after the execution of the notes and mortgage, and under the terms of the mortgage defendant Rauer had a right to take possession of the property upon default. The taking of possession by defendant Rauer of this equipment was not adverse, but was in entire conformity with this very provision of the mortgage contract entered into between him and the corporation, and when he did take possession it was with the consent of the corporation and with the understanding that he should be entitled to apply upon his indebtedness all rentals or values received for the use thereof. Immediately after February 19, 1915, and when defendant Rauer took possession of the equipment, he found the three sand machines in such a condition that they were useless, and he reconstructed them, paying therefor between \$400 and \$500 each, and the total repairs on said equipment aggregated \$2025.96. (See testimony p. 475, and defendant Rauer's bill of expenses—Exhibit 2 hereto attached.)

Defendant Rauer also introduced his file of bills for these repairs but because these bills (Except \$148.43 of them) were not receipted, the Master

allowed only the \$148.43 and has disallowed the remainder of said \$2025.96, although they were accompanied by the statement of defendant Rauer of the amounts expended by him therefor, and although defendant Rauer testified that he had paid them.

All this equipment, including the sand machines, and which was Mr. Rauer's sole security for his advances, was sold in this proceeding on December 7, 1916, for the sum of \$3701.60, which was 90% of the value thereof fixed by appraisers appointed in this proceeding; and for the use of this equipment for [136] the period of fifteen months, the Master charges defendant Rauer with the sum of \$9,006.99, which is more than twice its value; and these sand machines, tracks, cars and general excavating machinery were used for a period of fifteen months in the roughest kind of work requiring constant and expensive repairs and replacements, and which repairs and replacements Mr. Rauer's accounts shows cost him \$2025.96; and the Master charges him with \$9006.99 rentals and allows him repairs and replacements during that period the stupendous sum of \$148.43. The flagrant injustice of this appears from the very nature of things, and this was all mortgaged property, mortgaged to defendant Rauer way back in June, 1914, for the debt the Sunset Construction Company owed him, and which debt even according to the Master's finding amounted on February 19, 1915, to \$18,746.22. After February 19, 1915, defendant Rauer used this mortgaged property, and rebuilt and repaired

it, and collected the value of the use and rental of that property and applied every cent upon this mortgage debt. His possession of the property during this period was without the slightest objection from the Sunset Construction Company or even the plaintiff in this case, and the Sunset Construction Company received the full benefit thereof by having it credited on its debt. Under the laws of the State of California the only difference between a chattel mortgage and a pledge is that in the chattel mortgage the mortgagor may retain possession. When that possession goes to the mortgagee that difference ceases. It then had all the elements of a pledge in Rauer's hands. He used it, collected the rentals and applied the results upon the indebtedness the corporation owed him, and under the law (Cal. Civil Code, Sec. 2989), not only the physical property, but its increase, and its rentals, belong to the pledgee for the purpose of application by him upon the indebtedness secured thereby; and defendant Rauer had a right to take such possession under the [137] very terms of the mortgage, and to rebuild the sand machines and the rest of the equipment so that it would earn something and reduce the Sunset Construction Company's indebtedness to him.

During the same time that these various jobs were going on Mr. Rauer was advancing all necessary funds to the Sunset Construction Co. for its various operations; and, as shown by his statements, the balance the Sunset Construction Co. still owes him upon these advances since February

19, 1915, is the sum of \$18,561.54, besides the balance owing him, on Feb. 19, 1915, and which even the Master found to be \$18,746.22.

And defendant Rauer excepts to the Master holding that he cannot apply the value of the use of the property mortgaged to him upon the actual expenses he was to in rehabilitating, repairing and maintaining that property and also upon the current advances he made to the Sunset Construction Co., nor upon the debts that they owed.

This contract with the Federal Construction Co., as the result of which the Master seeks to charge defendant Rauer with \$5,381.79 (one-half the gross profits thereof) was a verbal contract entered into between the Federal Construction Co. and the Sunset Construction Company about January, 1915, and according to which the Federal Construction Co. was to furnish the money and the Sunset Construction Co. was to furnish the services of A. E. Buckman as construction engineer and the equipment, and nothing whatever was done on this contract until April 11, 1915 (the bankruptcy of A. E. Buckman was on Feb. 19, 1915).

This was a contract requiring for its fulfillment the personal services of A. E. Buckman, and even if we proceed upon [138] the construction placed upon this case by the Master that the bankruptcy of Buckman was the bankruptcy of the Sunset Construction Company, still this is a contract requiring the personal services of the bankrupt, entirely unperformed at the time of the bankruptcy, and subsequently performed by the rendition of

this personal service; and therefore under no construction did it pass to the bankrupt's trustee.

As we have seen (p. 21 of these exceptions and Ex. 1, p. d.) the gross rental value of the equipment employed on these Federal Construction Co. jobs, at the high estimate placed thereon by plaintiff's expert, only amounted to \$1050.00; while besides the rendition of the personal services by A. E. Buckman upon these jobs, defendant Rauer furnished his own personal services, and also the equipment necessary, and the teams required and money therefor; and defendant Rauer gave full credit for his receipts therefrom upon his current advances to the Sunset Construction Co. and the moneys so owing by it to him. [139]

EXCEPTION VI.

Exception is taken to the report of the Master because the report proceeds upon an erroneous construction of the decree under which the reference was made.

The Master has construed the decree as being an adjudication by the court that no recognition can be given to the corporation, Sunset Construction Co.; that such corporation must be viewed as nonexistent—simply as Buckman masquerading under the name of Sunset Construction Company, and that such masquerading was for the purpose of defrauding the creditors of Buckman, and that Rauer must be considered as a participant in the fraud and as conspiring with Buckman in the purpose of defrauding Buckman's creditors.

In other words, the construction placed on the decree by the Master is to the effect that this litigation did not proceed to determine the ownership of the shares of stock referred to in the complaint; that the shares of stock in law had no existence, and that it was not sought by this litigation, or by the decree, to give the trustee in bankruptcy any rights attached to the ownership of the shares, but that the purpose of the litigation was to have it declared that there were no shares of stock in legal effect; *that there was no corporation, Sunset Construction Company*, and that an accounting must be had between defendant Rauer and the trustee in bankruptcy just as if Buckman, the bankrupt, and not the corporation had transacted business with Mr. Rauer; that no attention or consideration should be given to the allegations of the complaint, wherein it is alleged that the Sunset Construction Company is a corporation, and that Buckman was the owner of the shares of the stock of the corporation, that the transfer by Buckman of these shares to Rauer was in fraud of creditors, or that the transfer of these shares should be [140] set aside, or to the allegation that it should be adjudged that the shares belonged to the trustee in bankruptcy so that from the proceeds of those shares, the trustee might have assets to pay the creditors.

The construction which the defendant Rauer contends should be placed upon the decree is that the action in which the decree was rendered was brought to have it declared that the trustee in

bankruptcy was the owner of all the shares of stock in the Sunset Construction Co., a corporation, on the ground that the shares had been issued to A. E. Buckman, except the qualifying shares to the other directors; that the transfer by Buckman to Rauer was not effective, and that the transfer of said shares was void, and that hence, as the shares belonging to Buckman were practically all the shares of the corporation, and passed to the trustee in bankruptcy, that he, the trustee in bankruptcy, as the owner of said shares of stock of the corporation, was entitled to an accounting of all transactions between Rauer and the corporation.

It is the contention of defendant Rauer that the complaint and the decree recognize the existence of the corporation, and that the decree determines that defendant Rauer, as an individual, shall account to the corporation, the Sunset Construction Co., of all transactions between him on the one side and the corporation on the other from the said 12th day of December, 1911, down to the time of the making of the decree, Sept. 11, 1916.

Defendant Rauer contends that the construction placed upon the decree by the Master cannot be reconciled with the theory upon which the complaint was filed, and that the evidence in the case shows that the trial did not proceed, nor was there any issue raised bearing out the construction placed upon the decree by the [141] Master; that the pleadings in the case show that the issues were as to whether Buckman had fraudulently transferred the shares of stock, and as to whether the

fraudulent transfer should not be set aside, and that shares of stock be decreed to belong to the trustee in bankruptcy; and that the evidence has shown that this defendant has at all times and in every one of his transactions dealt with said corporation in the full belief that he was dealing with a corporation, which the complaint herein alleges the Sunset Construction Co. at all times was; and even if said corporation had only been a *de facto* corporation the dealings of third parties with it could not be affected by a stockholder's bankruptcy.

EXCEPTION VII.

This defendant further excepts to the report of the Master and prays that it be set aside and considered null and void for the following reasons:

That this action is prosecuted by a trustee in bankruptcy; that it was known to the Master before he filed his report herein that there were no assets of any kind or nature belonging to the estate represented by the plaintiff, as trustee, except the claim involved in this litigation; that the Master has filed a petition in this court in this case requesting that he be allowed the sum of \$5,000.00 for services rendered by him in receiving the evidence and making his report; and in his petition he alleges that time amounting to 12 days was consumed in hearing the evidence and 30 days was required by him to make his report, amounting to 42 days, for which he asks the said sum of \$5,000.00, and the Master requests in his said petition that this \$5,000.00 be ordered paid

by the defendant Rauer within ten days from the date of the order, and that the \$5,000.00 so to be ordered paid by the defendant Rauer be in addition to the amount of the judgment reported against [142] Rauer by the Master; and this because of the facts set forth in the Master's petition that Rauer is found by the report to be indebted to the plaintiff, and that there are no funds in the possession of the trustee, other than such as might result from an approval of said report; and that unless a judgment were found against defendant Rauer there could be no basis for the Master's request for a \$5,000.00 compensation, or its imposition against defendant Rauer.

While defendant Rauer disavows the thought that the Master in making his report was consciously affected by the foregoing considerations, yet it is a fact that the said conditions existing, the Master's claim for \$5,000.00 compensation would be affected by his judgment, and therefore the report should not be considered.

WHEREFORE this defendant prays that this Honorable Court do not adopt the Master's conclusions as set forth in his Report, but that it be decreed that the defendant Rauer owes nothing whatsoever to said corporation, Sunset Construction Co., and nothing whatsoever to plaintiff, trustee for A. E. Buckman, bankrupt.

Respectfully submitted,

H. M. ANTHONY,

GRANT & ZIMDARS,

Attorneys for Defendant J. J. Rauer. [143]

Exhibit 1.

The Master has charged that Mr. Rauer is liable to Buckman's trustee for the rentals and use since February 19, 1915, of the personal property mortgaged to Mr. Rauer by the Sunset Construction Company in the following amounts, viz.:

"January 1916 Rental of	
equipment on T. Street	
job '.....	\$1,312.50
Less repairs	148.43
<hr/>	
\$1,164.07	

Miscellaneous collection of rentals (Report page 24) consisting of the following:

Hutton, included in statement of account, under date August, 1916..... 927.00

Items not included in account but shown in statement of account rendered Buckman:

Sept. 10, 1916.....	\$200
Oct. 14, "	400
Nov. 10, "	400
Dec. 9, "	300

1,300.00

Rent from Morgan Im-	
provement Co.	159.13
Scrap iron sold.....	75.00
	<hr/>
	2,461.13
1/2 Federal Construction	
Co. payment.....	5,381.79
	<hr/>
	\$9,006.99

In the exceptions, this defendant has set forth the reasons why he should not be required to pay these sums to Buckman's trustee, and he herewith presents a statement showing the following, viz.:

The jobs on which any of this equipment was employed by defendant Rauer, the time during which it was employed on these various jobs, and the actual part of the equipment that was so employed, and the rental or the value of the use thereof as estimated by plaintiff's own expert witness Simmie (testimony pages 429, 430). [144]

As to the item,

"1916

Jan. Rental of equipment on T. St. job	
(testimony 485-489).....	\$1,312.50
Less repairs.....	148.43
	<hr/>
	\$1,164.07

This extended from Apr. 11, 1916, to July 24, 1916, 3½ months, and the equipment on this job and the rentals therefor, for said 3-1/2 months, as per plaintiff's expert Simmie would be as follows:

1200 ft. of track at 3¢ per month for 3-1/2 months.....	\$126.00
25 cars at \$5.00 per month for 3-1/2 months	437.50
1 sand machine at \$150.00 per month for 3-1/2 months.....	525.00
	<hr/>
	1,088.50

(As to this job, Mr. Rauer made a 50-50 agreement with the Sunset Construction Co. on a profit and loss basis, and Mr. Rauer lost 945.00, none of which has been repaid, but instead the Master charges up as rentals against Mr. Rauer on this job, \$1,164.07.)

As to the item:

“Hutton, included in statement of account under date August 1916..... \$927.00
This lasted from May 10, 1916, to Aug. 14, 1916—
3 months.

The equipment on this job and the rentals therefor for the three months, as per plaintiff's expert Simmie, would be as follows:

570 ft. track at 3¢ per ft. per month for 3 months.....	\$51.30
12 Koppel cars at \$5 per car per month for three months.....	180.00
1 sand machine at \$150 per month for three months.....	450.00
	<hr/>
	\$681.30

(On this contract Mr. Rauer actually collected \$927.00, and this the Master charges to him, instead of the actual value of the rentals, although the Master refuses to allow Mr. Rauer for his loss of \$945.00 on the "T" St. contract.) [145]

As to the items:

"Not included in account, but shown in statement of account rendered Buckman," totalling.....\$1,300.00
Hutton & Cramer—

This lasted from Aug 24, 1916, to December 9, 1916—3-1/2 months.

The equipment on this job and the rentals therefor for the 3-1/2 months, as per plaintiff's expert Simmie, would be as follows:

570 ft. of track at 3¢ per month for	
3 months.....	\$59.85
12 kopple cars at \$5.00 per car per	
month for 3 1/2 months.....	210.00
1 sand car at \$150.00 per month	
for 3 1/2 months.....	525.00

794.85

(In this instance Mr. Rauer made an advantageous contract and collected \$1,300.00, all of which the Master charged against him, even though he refused to allow for his loss of \$945.00 on the T. St. contract, and permits him no set-offs for repairs or for his time.)

As to the item:

"Rent from Morgan Improvement Co..... 159.13"

This lasted from Aug. 24, 1916, to Nov. 13, 1916, 3 months.

The equipment on this job, and the rentals therefor, as per plaintiff's expert Simmie, would be as follows:

300 ft. of track at 3¢ per ft. per	
month for 3 months.....	27.00
5 koppel cars at \$5.00 per car per	
month for 3 months.....	75.00
	<hr/>
	\$102.00

(But the Master charges Mr. Rauer therefor with \$159.00, which is the total Rauer received, and permits him no set-offs for repairs or for his time.)
[146]

The next item: Scrap iron..... \$75.00
is charged against Mr. Rauer
by the Master. This indeed
is unique.

(This scrap iron consists of the broken parts replaced by Mr. Rauer upon the machinery which was mortgaged to him, and for which replacement he is not allowed, and still this scrap iron, which was part of the property actually mortgaged to him, and the proceeds of which to the extent of \$75.00 he applied upon his mortgage debt, he is charged with, and directed by the Master to pay to Buckman's trustee.)

As to the item:

"1/2 of Federal Construction Co. payment \$5,381.79"

This consists of the following two jobs:

San Bruno (testimony 485) from Apr. 11, 1915 to July 31, 1915, 3-2/3 months.

The equipment on this job, and the rentals therefor for the 3-2/3 months, as per plaintiff's expert, Simmie, would be as follows:

1,000 ft. of track at 3¢ per foot per	
month for 3-2/3 months.....	\$110.00
11' wooden cars at \$5.00 per car per	
month for 3-2/3 months.....	220.00
	<hr/>
	\$330.00

21st Ave. and B. St., July 30, 1915 to Oct. 30, 1915, 3 months—

1,000 ft. of track at 3¢ per ft. per	
month for 3 months.....	90.00
12 koppel cars at \$5 per car per	
month for 3 months.....	180.00
1 sand machine @ \$150 per month	
for three months.....	450.00
	<hr/>
	720.00

720.00

\$1,050.00

(This was an extremely profitable job, and the Master charges Mr Rauer with the full amount of the profits, which the Master holds as applicable to the equipment, and allows Mr. Rauer not a cent repairs or for anything else, and does not allow him his losses on the "T" St. job.) [147]

To recapitulate:

The total rental of the equipment so employed by Mr. Rauer for the period so employed, at the high rental value placed thereon by plaintiff's expert, Simmie, is the following:

T. St. job April 11, 1916 to July 24, 1916	\$1,088.50
Hutton job, May 10, 1916 to Aug. 14, 1916,	681.30
Hutton and Cramer job, Aug. 24, 1916, to Dec. 9, 1916.....	794.85
Morgan Imp. Co. job, Aug 24, 1916 to Nov. 16, 1916.....	102.00
Federal Construction Co. jobs, San Bruno and 21st Aves. and B. St., April 11, 1915 to July 31, 1915, and July 30, 1915 to Oct. 30, 1915.....	1,050.00
	<hr/>
	\$3,716.65

[148]

Exhibit 2.

(Testimony pp. 488-90; also bills; also objections to Master's tentative report pp. 31-32.)

Amounts paid by Defendant J. J. Rauer for repairs and betterments of equipment:

1915		Voucher Number	Amount
April 15,	Enterprise El. Co.....	651	\$100.00
May 16,	Enterprise El. Co.....	650	85.00
June 5,	Meese & Gottfried Co.....	341	39.80
" 22,	Enterprise El. Co.....	15	100.00
" 22,	Messe & Gottfried Co.....	346	29.29
" 22,	Meese & Gottfried Co.....	165	12.45
" 26,	Iron, etc. Waterhouse & L.....	718	73.10
July 14,	Meese & Gottfried Co.....	170	29.29
" 23,	Waterhouse & Lester Co.....	178	78.27
" 23,	Meese & Gottfried Co.....	172	24.10
" 28,	Meese & Gottfried Co.....	359	2.20
" 31,	Pacific Steel & Hdwe. Co.....	167	29.70

		Voucher Number	Amount
1915			
July	31,	Meese & Gottfried Co.....	\$ 24.45
"	31,	Meese & Gottfried Co.....	3.65
"	31,	Hall Electric Co.....	20.00
Aug.	2,	Scott Wagner & Co.....	103.64
"	5,	Meese & Gottfried Co.....	15.65
"	6,	Steel & Supply Co.....	8.30
"	6,	Meese & Gottfried Co.....	29.05
"	6,	Meese & Gottfried Co.—Cash.....	1.80
"	11,	Belting, Degen.....	1.00
"	11,	Western Scraper Co.....	34.00
"	21,	Waterhouse & Lester.....	147.29
"	21,	Hall Electric Co.....	20.00
"	26,	Hall Electric Co.....	12.40
Sept.	4,	Meese & Gottfried Co.....	16.00
"	16,	Meese & Gottfried Co.....	2.85
"	16,	Waterhouse & Lester.....	6.30
Oct.	4,	Meese & Gottfried Co.....	8.08

		Voucher Number	Amount
1915			
Oct.	14, Meese & Gottfried Co.....	230	\$ 1.25
"	16, Hall Electric Co.....	235	5.60
"	28, Waterhouse & Lester.....	236	48.77
			<hr/>
			1,113.28
Nov.	16, Waterhouse & Lester.....	254	7.55
Dec.	1, Ajax Fdy. Co.....	258	15.70
"	Waterhouse & Lester.....	377	5.70
"	15, Enterprise El. Co.....	272	80.00
"	28, Dolan Wrecking Co.....	270	20.50
"	30, Meese & Gottfried Co.....	261	8.00
1916			
Jan.	3, Enterprise El. Co.....	14	3.25
"	8, Western Pipe Co.—Bal. due.....	381	1.16
"	24, Waterhouse & Lester.....	265	8.30
"	28, Costs " " .....		.80
Feb.	4, Ajax Fdy. Co.....	7	12.60

1916		Voucher Number	Amount
Feb.	4, Enterprise Elec. aa & L.....	275	\$ 1.90
"	21, Meese & Gottfried Co.....	282	7.08
Mar.	6, Enterprise El. Co.....	286	4.60
"	6, Ajax Fdy. Co.....	283	25.20
"	6, Meese & Gottfried Co.....	287	27.12
"	14, Waterhouse & Lester.....	284	34.60
			<hr/>
			\$264.06
[149]			
Forward,			
Mar.	30, Meese & Gottfried Co.....	298	264.06
Apr.	5, Waterhouse & Lester.....	296	26.50
"	9, " " ".....	310	19.18
May	3, " " ".....	312	68.00
"	3, " " ".....	311	17.82
"	2, Ajax Fdy. Co.....	5	7.00
"	2, Enterprise Elec. Co.....	319	4.00
			9.10

		Voucher Number	Amount
1916			
May	2, Meese & Gottfried Co.....	320	\$ 11.48
"	4, Waterhouse & Lester.....	316	24.60
June	2, Enterprise Fdy. Co.....	329	17.50
"	2, Waterhouse & Lester.....	326	19.38
"	6, Meese & Gottfried Co.....	2	101.98
"	17, Meese & Gottfried Co.....	334	7.90
"	22, Waterhouse & Lester.....	331	29.40
"	" " ".....		4.02
"	" " ".....		5.64
1915			
Dec.	8, " " ".....	13	1.38
1916			
April	8, Ajax Fdy. Co.....	11	34.30
June	26, Meese & Gottfried Co.....		49.85
July	22, " " ".....		8.61
"	31, " " ".....		6.75
Sept.	8, " " ".....		27.74

		Voucher Number	Amount
1916			
Sept.	15, Meese & Gottfried Co.....		\$ 2.48
"	" " "		30.22
Oct.	18, " " "		13.79
Aug.	16, Ajax Fdy. Co.....		100.00
		<hr/>	<hr/>
		377.74	1,648.22
			377.74
		<hr/>	<hr/>
			\$2,025.96

Received a copy of the within objections this 25th day of January, 1922.

E. H. WILLIAMS,

CHARLES S. WHEELER, Jr.

[Endorsed]: Filed Jan. 26, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[150]

(Title of Court and Cause.)

Objection to Special Master's Petition for Compensation.

To the Honorable Judge of the United States District Court:

Comes now the defendant J. J. Rauer and files the following objections to the petition of the Special Master for compensation, and which petition was filed herein, and a copy served upon this defendant January 10, 1922, viz.:

The Master states that he has spent 12 days in taking testimony and 30 days in giving consideration thereto and making his report, or a total of 42 days, and he asks therefor compensation in the sum of Five Thousand (\$5,000) and he asks that his compensation be charged against defendant J. J. Rauer.

Defendant J. J. Rauer objects both to the extent of said compensation, and to the same, or any part thereof, being charged against him, and in that respect represents as follows:

That it appears from this defendant's objections to the Master's report herein referred to, and

from said report and the testimony in said matter, and from the order of reference herein, that this defendant was dealing solely and alone with the Sunset Construction Company, which was, at all the times that this defendant was dealing with it, a duly incorporated and organized and existing and functioning corporation, of which the bankrupt A. E. Buckman owned all the stock, except the qualifying stock to the other directors.

That said corporation has never been declared a bankrupt, and no bankruptcy proceedings have ever been initiated against it.

That said corporation owed to this defendant at the time of the bankruptcy of said A. E. Buckman, large sums of money, stated by him to be in excess of Thirty-six Thousand Dollars (\$36,000), which even the Master finds were at said time [151] in excess of Eighteen Thousand Dollars (\$18,000); and that in this defendant's subsequent dealings with said Sunset Construction Company said corporation became indebted to him to the extent of over Eighteen Thousand Dollars (\$18,000) more, and is so indebted to him at the present time in excess of the sum of Thirty-six Thousand Dollars (\$36,000).

That the Master refused to take into account this defendant's account with said corporation, except up to the date of said Buckman's adjudication as a bankrupt, and took the position that since said Buckman was the owner of practically all of the capital stock of said corporation, that therefore the application by this defendant of his subsequent

receipts from the corporation upon this defendant's debts, should not be permitted, but that the corporation's money, which it had so permitted him to apply upon the corporation's debt to him, should be paid over by this defendant to the trustee in insolvency of A. E. Buckman, and these receipts the Master states amounted to the sum of Thirteen Thousand Twenty-three and 19/100 Dollars (\$13,023.19).

This defendant further represents that according to the evidence, and even according to the Master's report, this defendant's dealings with said corporation were in the full belief that he had the right to deal with said corporation as a separate entity unaffected by the insolvency proceedings against A. E. Buckman personally, and that his dealings with said corporation were fair and above board, and that he paid value to this corporation for everything that he received from it, and, in fact, said corporation is at the present time indebted to him in excess of \$36,000, even after the application of all he received from said corporation.

This defendant further represents that the Master's statement that the amount involved in this litigation was \$70,000 [152] is misleading. That it is true the trustee in bankruptcy made the claim that there was approximately \$32,000 owing by this defendant to the trustee of Buckman on account of this defendant's dealings with said corporation, but that the evidence shows that there is not a single cent owing from this defendant to said trustee, and that this even appears from the

facts found by the Master; and that the evidence further shows that a serious injustice would be inflicted upon this defendant were the Master's conclusions and his petition herein given effect.

This defendant further represents that none of the creditors who have filed their claims in the above proceedings were creditors of, or in any manner connected with the transactions of the Sunset Construction Company; and that no notice was ever given to creditors of the Sunset Construction Company to file their claims herein, and that creditors of the Sunset Construction Company were never considered in these proceedings as creditors of Buckman; and that this defendant is a creditor of the Sunset Construction Company to the extent of over \$36,000, even after applying upon the indebtedness all the moneys received from the Sunset Construction Company, and that even according to the Master's report the total assets of the Sunset Construction Company were only \$13,023.19, and that \$9016.99 of this consists of rentals charged by the Master against defendant Rauer, and which arise out of this defendant's use of the very property that was mortgaged to him as security for his \$36,000 balance, and which personal property only sold for \$3701.22 and which \$3701.22 although belonging to this defendant, is impounded in this court in this action, and that this matter never involved \$70,000, but at most \$13,023.19.

And this defendant further represents that the claim here made by the Master for \$5000 compensation for 42 days' service is out of all proportion

and reason; and that the highest paid [153] Judges of the Superior Court in the State of California only receive a salary of \$6000 a year, for which they give at least 300 days' service in the year, or at the rate of \$20 per day, which for 42 days would only be \$840, and that the great majority of the Superior Court Judges of the State only receive \$4000 per year, or at the rate of \$13.1/3 per day, which for 42 days would be only \$560; that the Judges of the Supreme Court of the State of California only receive a salary of \$8000 a year, for which they give at least 300 days' services a year, or at the rate of \$26.2/3 per day which for 42 days would be only \$1120.

That previous to the filing of the Master's petition herein asking for \$5000 compensation and for its charge against and immediate collection from this defendant, this defendant and his counsel were astounded at the Master's repeated reiteration of the great difficulties encountered by him in the making of his report and at his conclusions therein.

That the Master has entirely misconceived the meaning of the decree of reference, and has as a consequence done unnecessary work, and that the evidence demonstrates that a week's time by a competent accountant would have sufficed to determine the status of the accounts.

And this defendant represents that the said order of reference is not yet final, and that therefore no order for immediate payment against this defendant could be made, as requested; and that the Master's petition for the charge of his compensa-

tion against this defendant proceeds upon the assumption that his report is already the judgment of this Court, whereas until final judgment is entered herein an order charging compensation against a party would have no foundation.

And this defendant further represents that the said [154] exceptions and objections to said report, a copy of which is hereunto appended and made a part hereof, are now pending before this court and undetermined, and that no charge should be made against any defendant until it is definitely determined that there is money owing from such defendant in favor of the party bringing the action; and this defendant verily believes that upon a consideration by this Court of this defendant's said exceptions and objections, the justice of this defendant's contention will be recognized by this Honorable Court and the conclusions of the Master will be overruled and set aside and not adopted as the judgment of this Court; and that the judgment of this Court will be that it appears even from the facts as found by the Master that this defendant owes nothing to the plaintiff trustee for said A. E. Buckman, bankrupt, and that this defendant owes nothing to the Sunset Construction Company, but that instead the Sunset Construction Company is indebted to this defendant in excess of \$36,000 (which in itself will be a total loss to this defendant). That according to the Master's report said corporation owed this defendant \$18,746.22 on February 19, 1915, and the moneys he has received from it since amount to \$13,023.19.

It is submitted that the request for \$5,000 compensation asked for by the Master is most unreasonable; that the Master's report shows that Rauer has acted in good faith in all his dealings, and the liability which is fastened upon him by the Master is upon a technical construction of the law, and in no wise charges Rauer with intentional wrongdoing. That concededly according to the report, Rauer suffers a very great loss in any event; that the report shows that there are no assets of any kind pertaining to the bankrupt estate, other [155] than the property right involved in this litigation; that there can be no recovery by Rauer of any of the costs or expenses of this litigation should it be finally determined that Rauer, instead of being liable to account, is entitled to a judgment against the plaintiff; that Rauer has already been to a very large expense, and the plaintiff, as trustee of a bankrupt estate, is under no liability to reimburse him for his costs or outlays, except to the extent of assets that may come into his hands,—and, as before stated, there are no assets apart from the sum that may possibly be recovered from Rauer in this present litigation.

It appears from the Master's report that his request for the \$5000 compensation is based upon his report that the defendant Rauer is liable to account; that the Master would not have made the request for the \$5000 compensation if his judgment had been in favor of Rauer and against the plaintiff.

While we disavow any thought of charging the

Master with being consciously affected by the foregoing facts and by the circumstance that from Rauer alone could a fund be derived out of which the Master could be paid, yet, it is respectfully submitted that the foregoing matters, developing as they do a most delicate situation, should be taken into consideration by this Court in ruling upon this matter of the Master's compensation.

WHEREFORE, this defendant prays that in fixing the compensation of the Master this Court take into consideration the matters and things here called to its attention, and that no portion of said compensation be charged against this defendant.

H. M. ANTHONY,
GRANT & ZIMDARS.

* * * * *

Received a copy of the within objections this
[156] 25th day of January, 1922.

E. H. WILLIAMS,
CHARLES S. WHEELER, Jr.,
Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 26, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [157]

At a stated term, to wit, the July term, A. D. 1922, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the courtroom in the city and county of San Francisco, on Monday the 18th day of September in the year of our Lord one thousand nine hundred and twenty-two. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

(Title of Court and Cause.)

**Minutes of Court—September 18, 1922—(Order
Overruling Exceptions to Master's Report,
Etc.).**

The exceptions of Defendant Rauer to the Master's report and to the Petition of the Master for compensation, heretofore submitted, being now fully considered and the Court having rendered its oral opinion, it is ordered that said exceptions to the report be and are hereby overruled and that the compensation of the Master be fixed in the sum of \$1800.00 to be paid by the defendant Rauer in the first instance. [158]

(Title of Court and Cause.)

Oral Opinion—Monday, Sept. 18, 1922.

Overruling Exceptions to Master's Report, and
Fixing Master's Compensation.

Hon. WM. C. VAN FLEET, U. S. District Judge.
Messrs. CHAS. S. WHEELER, CHAS. S. WHEEL-
ER, Jr., and E. H. WILLIAMS, Attorneys for
Plaintiff.

Messrs. ANTHONY, GRANT & ZIMDARS, Attor-
neys for J. J. Rauer.

Oral Opinion.

The COURT. (Orally.)—This is an action by the Trustee of a bankrupt to recover certain property alleged to be the property of the bankrupt although standing in the name of a corporation. The matter was heard and decree was entered, the judgment being that the property was the property of the bankrupt at the time of the bankruptcy and should be recovered into the hands of the Trustee, and directing an accounting at the hands of those in whose hands the property was over a certain period down to the date of the trial.

Exceptions have been filed to the Master's Report, the principal one, and the only one in fact upon which any particular stress was laid, being that the master has wholly failed to appreciate the real character of the decree and that the accounting was had under a misapprehension of its effect. I do not know that counsel in the case are here and

therefore, it not being a matter of general interest, it is sufficient to say that the contention is based wholly upon a misapprehension as to the proper construction and effect of the decree. The complaint alleged, as I have indicated, that the property in [159] question belonged to the bankrupt and that for the purpose of concealing it from his creditors he organized a corporation, in which he held the entire amount of stock, which corporation was organized as a mere cloak under which he managed the property, and that it was his individual property although ostensibly held in the name of the corporation. The decree presented by counsel and signed by the Court simply decreed that the property was at the time of the bankruptcy the property of the bankrupt. Now that determined the issues just as definitely as though the Court had proceeded in accordance with the method followed in the State practice and recited all the facts upon which that decree was based. Under Equity Rule 71 it is expressly provided that a decree shall have only a recital of that which is decreed. You do not recite the facts at all and that omission seems to have given to the mind of counsel a misapprehension as to its effect because it does not recite all the facts underlying the decision that is embodied in the decree. The decree fully meets the ultimate issues presented by the pleadings; that is, that this property (leaving out the recital of the facts upon which the conclusion is based), was the property of the bankrupt, and when the Court decreed that it

was the property of the bankrupt it decreed that the evidence sustained the facts alleged in the complaint which warranted that decree; and that is really all there is in the proposition.

The other exceptions grow out of and are based upon the main consideration that there was this misapprehension on the part of the Master of the effect of this decree. The Master I think, if he committed any error committed it against the parties prevailing as to the extent of the accounting required.

There is one other matter, not an exception to the Master's report but an objection to the amount of compensation requested by the Master. The Master expended some 12 days in the trial, but claims for a period of some 30 days during [160] which the matter was under advisement and being worked on by him and he asks a fee of \$5,000, or a minimum of \$4,200. He claims 30 days, I think, outside of court and 12 days in it, that being 42 days, and he asks for \$4,200 based upon a compensation at the rate of \$100 per day. As I intimated at the argument, I think that the demand is beyond the reasonable limits of the Court's discretionary power in the matter. We aim, of course, to compensate Masters adequately for the labor performed and it is based upon, to a very appreciable extent, the amount involved. There is no fixed standard of compensation for a Master—it varies all the way from \$25 a day up to \$150 and sometimes, in large matters, even higher, but I think that it would be inequitable to have the

parties in this case pay the amount asked. I am of opinion that under the circumstances and having in view the amount involved, time expended and the issues, that \$1800 is a full and ample compensation for the Master; and that will be the amount allowed and it will be directed that it be paid by the Defendant Rauer in the first instance.

The exceptions to the Master's Report will be overruled.

[Endorsed]: Filed Sept. 25, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[161]

(Title of Court and Cause.)

**Order Overruling Exceptions to Master's Report
and Fixing Master's Compensation.**

This cause came on to be heard at this term and was argued by counsel; and, thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows:

That the exceptions of the defendant J. J. Rauer to the report of the Master, which exceptions are numbered I to VII inclusive, be and the same are and each of them is overruled.

That the final report of the Master be and the same hereby is approved and confirmed.

That the Master, H. M. Wright, Esquire, be and he is hereby allowed, given and granted the sum of Eighteen Hundred (\$1800) Dollars as and for compensation for his services herein, the same to be paid by the said defendant, J. J. Rauer, in the

first instance, within 20 days from notice of this order.

Dated September 30th, 1922.

WM. C. VAN FLEET,
Judge of the United States District Court.

[Endorsed]: Filed Sep. 30, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [162]

(Title of Court and Cause.)

Final Decree.

The Court having heretofore and on the 11th day of September, 1916, made its Decree wherein it adjudged that A. E. Buckman at all times and up to and on the 19th day of February, 1915, was the owner of Sunset Construction Company and of all of the property, books and records of said company, and that on said last-mentioned day said company, property, books and records vested in and became the property of the Trustee of the Estate of said A. E. Buckman, Bankrupt; and having decreed therein that defendants A. E. Buckman, J. J. Rauer, Fillmore Buckman and William H. Chapman severally account for all moneys or property received by them from or advanced by them to defendants Sunset Construction Company since the 12th day of September, 1911; and having further decreed that for the purpose of taking said above-mentioned accounting said cause be referred to H. M. Wright, Master in Chancery of this court, to take and examine said account and report thereon to this court;

And the said parties to this cause having appeared before said H. M. Wright, said Master in Chancery, and said accounting having been had by and before said H. M. Wright, and said accounting having been taken, examined and reported by him to this court; and it having been determined by said report that certain moneys are due from defendant J. J. Rauer to the plaintiff Trustee, but that there is nothing due to said plaintiff from the defendants A. E. Buckman, Fillmore Buckman and W. H. Chapman, or either or any of them; and said report having been excepted to by defendant J. J. Rauer, and said exceptions to said report having been fully argued by counsel [163] for the respective parties to said cause, and, at the March term of this court said exceptions to said report having been submitted to this court for decision, and said cause having been thereupon taken under advisement by this Court and its decision thereof having been continued until the present term,

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

(1) That each and all of said exceptions of said J. J. Rauer to said report of and on said accounting had and returned to this court as aforesaid by said H. M. Wright, Master in Chancery, be and the same are hereby disallowed and overruled; and that said report be and the same is hereby ratified, approved and confirmed as a just and true report and account;

(2) That the defendants A. E. Buckman, Fillmore Buckman and William H. Chapman be and they are hereby dismissed from the above-entitled suit and it is hereby decreed that they recover from the plaintiff trustee their costs, charges and disbursements in this suit to be taxed;

(3) That the sum of Three Thousand Seven Hundred One and 60/100 (\$3,701.60) Dollars now deposited with this court in the matter of the bankruptcy of said A. E. Buckman be and the same is hereby declared due to said J. J. Rauer, but it is hereby decreed that the same shall be held and retained by plaintiff, and payment made to said J. J. Rauer by credit on the amount hereinafter declared due to said Plaintiff Trustee from said defendant J. J. Rauer.

(4) That there is now due and payable from said J. J. Rauer to said Plaintiff Trustee, after crediting said sum of Three Thousand Seven Hundred One and 60/100 (\$3,701.60) Dollars now in possession of this court as aforesaid, the sum of [164] Nine Thousand Three Hundred Twenty-one and 59/100 (\$9,321.59) Dollars with interest from the date of rendition of said report, to wit: The — day of December, 1921, at the rate of seven per cent (7%) per annum, the same being moneys belonging to the said Estate in Bankruptcy of said A. E. Buckman, a Bankrupt, and to said plaintiff as the said Trustee thereof and collected and wrongfully retained by said defendant Rauer; and it is hereby decreed that said J. J. Rauer pay to said plaintiff Trustee said sum of Nine Thousand Three Hundred Twenty-

one and 59/100 (\$9,321.59) Dollars, together with interest as aforesaid, forthwith.

(5) That there is due from the Estate in Bankruptcy of A. E. Buckman, a Bankrupt, of which the plaintiff herein is his Trustee, to said J. J. Rauer, the sum of Fifteen Thousand Forty-four and 62/100 (\$15,044.62) Dollars after crediting on the total amount due said J. J. Rauer from said Estate in Bankruptcy the above-mentioned sum of Three Thousand Seven Hundred One and 60/100 (3,701.60) Dollars, and it is hereby directed and decreed that the claim of said J. J. Rauer against said Estate in Bankruptcy in the said sum of Fifteen Thousand and Forty-four and 62/100 (\$15,044.62) Dollars, being the total claim of said J. J. Rauer against said estate, less the sum of Three Thousand Seven Hundred One and 60/100 (\$3,701.60) Dollars credited thereon as aforesaid, be paid to said J. J. Rauer in due course of administration, provided said claim be filed therein in due form within the period of ninety (90) days after this decree shall become final.

(6) That plaintiff Trustee have and recover from defendant J. J. Rauer his costs, charges and disbursements in this suit to be taxed.

Dated October 6th, 1922.

WM. C. VAN FLEET,

Judge of the District Court of the United States
for the Northern District of California. [165]

Due Service and receipt of a copy of the within final decree this 3d day of November, 1922, is hereby admitted.

H. M. ANTHONY,
GRANT & ZIMDARS,
Attorneys for Defendants.

[Endorsed]: Filed and Entered Nov. 6, 1922.
Walter B. Maling, Clerk. [166]

In the Southern Division of the United States District Court, in and for the Northern District of California.

IN EQUITY—No. 233.

GEORGE J. HATFIELD, Trustee in Bankruptcy
of the Estate of A. E. Buckman, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, Bankrupt, J. J. RAUER, WM.
H. CHAPMAN, FILLMORE BUCKMAN,
J. A. MEADOWS, and SUNSET CON-
STRUCTION COMPANY, a Corporation,
Defendants.

Settled Statement on Appeal from an Order or Decree Made Herein on the 11th Day of September 1916, Including the Order Directing an Accounting and Referring the Matter of the Accounting to H. M. Wright, Master in Chancery of This Court, and from the Final Decree Made Herein on the 6th Day of November, 1922, Disallowing and Overruling the Objections

Made by J. J. Rauer to the Account and Report Filed Herein by H. M. Wright, Master in Chancery, Pursuant to the Order of September 11, 1916, and Confirming and Approving Said Report, and Decreeing That the Said J. J. Rauer, Defendant, Pay to the Plaintiff the Sums of Money in the Said Decree Specified.

BE IT REMEMBERED that the above-entitled cause came on for hearing in the August Term of the said court on August 30, 1916, before the Honorable Wm. C. Van Fleet, Judge of the said Court; T. H. Lane, Esq., and Lawrence M. Phillips, Esq., appearing as counsel and solicitors for plaintiff, and H. M. Anthony, Esq., appearing as counsel and solicitor for defendant J. J. Rauer; and at said hearing witnesses were sworn and examined, and documentary evidence introduced, and the substance of the said evidence and testimony, in so far as it relates or has any bearing upon the exceptions filed herein to the interlocutory decree and to the confirmation of the report of the Master in Chancery, and to the Final Decree entered herein, is as follows: [167]

And, first, as to the exceptions in support of the appeal from the interlocutory decree, viz.:

Testimony of Fillmore Buckman, for Plaintiff.

FILLMORE S. BUCKMAN called as a witness for plaintiff, testified as follows in response to questions by Mr. LANE, attorney for the plaintiff:

I am not now an officer of the Sunset Construction Company, but I was the secretary of the Corporation until July 1, 1915.

(Testimony of Fillmore Buckman.)

Mr. Lane called the attention of the court to the fact that it was admitted by the pleadings that A. E. Buckman was declared a bankrupt in February, 1915.

The witness, Fillmore Buckman, then proceeded:

I think A. E. Buckman was allowed Two Hundred (\$200.00) Dollars a month from the Company up to the time I left its employment. The officers of the corporation were: Mr. Chapman was president, Mr. Morey was Treasurer, and Mr. A. E. Buckman was General Manager, and I was Secretary. There were four Directors. I am a nephew of Mr. A. E. Buckman. Mr. Buckman got money from the Company as he needed it to carry on the business. I am not certain what his salary was. There was no fixed amount that Mr. Buckman was allowed for expenses. Some times it ran into the neighborhood of \$500.00 a month in carrying on the business. These expenses were going out of town and examination fees, and different things. Mr. Buckman took whatever money he needed from time to time. He was naturally managing the business. I won't say the business belonged to him, but he was running the business—handling all the outside work. I was looking after some of the contracts myself, but Mr. Buckman needed money for expenses for lines and grades, and his own personal use, and whenever he needed money, he took it. He would come to me and ask [168] for a check and I would give it to him. I believe that it was in the minutes that Mr. Buckman was to have the necessary expenses to

(Testimony of Fillmore Buckman.)

carry on the business. By personal expenses I mean expenses for his own personal use, that is living expenses. He would draw from \$5 up whenever he needed it and everything over his salary was charged up to expenses. He was allowed his expenses over and above the amount charged to his salary. He would account for part of the money, but not all. Sometimes he would bring back receipts for lines and grades. I was never a Director of the Company; always a Secretary.

Testimony of Arthur J. Meadows, for Plaintiff.

Mr. ARTHUR J. MEADOWS called for the plaintiff, testified as follows:

I am not now an employee of the Sunset Construction Company, but I was an employee up to the early part of February of this year, 1916. The position was not paying me, and I left the employment. My employment consisted in looking after the work, going out taking time, keeping a time-book, making up their pay-rolls each week, and general outside work. My salary was \$20.00 a week. I was not giving full time to the employment. I had been employed about a year and four or five months—from October 1914 to February, 1916.

I acquired 10,200 shares of the stock of the Sunset Construction Company about October 1914 for which I paid \$100.00. These shares were then transferred to me on the books of the corporation, either in 1914 or the early part of 1915. I do not know

(Testimony of Arthur J. Meadows.)

what proportion the 10,200 shares acquired by me bore to the entire number issued. The man from whom I bought the shares did not want them, and I said I would take them because I wanted to get a position with the Company. I never investigated to find out what part of the whole capital stock of the Company these [169] shares were. The man came to me and asked me to buy them. I purchased from a man named Mr. Wehrle. I notified the company just after I acquired the shares, but I do not think I had the shares transferred until two or three months afterwards. I had no agreement with anybody as to what I would do with these shares. I know that I owned all the shares of the corporation that had been pledged. I understood that was all the stock that had been issued. I did not know I owned the Sunset Construction Company; I didn't know but what they might issue other stock. Prior to the time I purchased the stock I had not been in the employ of the company; I had been in the collection business for 20 odd years in the City and County of San Francisco; part of the time as a collection agency and afterwards with Mr. J. J. Rauer. I had not been with Mr. Rauer for two years prior to 1914, nor since. I do not know what salary A. E. Buckman received, and I did not know what he was drawing from that concern. I did not inquire into these facts after I secured the controlling interest in the corporation. I did not place much value on the stock. My purpose in getting the stock was to get employment. I thought it would be

(Testimony of Arthur J. Meadows.)

an investment for me to get the work—the work of attending to some of the outside matters, seeing people, and making collections of assessments, for which I got a commission. I bought all the stock of the Sunset Construction Co. for the purpose of handling that business. I did clerical work for the Company. My position was given me by Mr. A. E. Buckman. I did not ask him to change directors or put in directors of my naming. I did not consider that a change in the management was going to affect me. I could not handle the practical part of the work. I bought the stock subject to the claims. I knew there were a lot of outstanding bills against the Sunset Construction Company because the creditors used to come to the office and ask if anything [170] had been collected on the bills. At the time I purchased I knew there would be no further obligations, because at that time Mr. Rauer was advancing money to meet the pay-roll; and also money to purchase the supplies. I knew that there would be no further indebtedness contracted by the company. I asked Mr. Rauer if it was all right and if it was safe to buy the stock. I told Mr. Rauer I would buy the shares of stock if I thought there was a chance of giving me work. I knew there was a big outstanding debt of the Sunset Construction Company at the time I bought. I knew that Mr. Rauer had a mortgage because I investigated that, and I knew there were a lot of outstanding bills for materials and supplies. The mortgage to Mr. Rauer was executed when I was in his em-

(Testimony of Arthur J. Meadows.)

ploy. I was with Mr. Rauer more or less for 15 or 16 years and then I was absent from the City, and had been in business for myself. It was not much business, because I had been sick. After my return from the country, I did not go back into his employ. I asked Mr. Rauer if I could make some collections, and he said he would speak to Mr. Buckman about it, and they gave me a few collections; afterwards I got this other work. I met Mr. Wehrle and he told me he had bought that stock. I told him I would probably be in a position where I could take it off his hands because I wanted to be connected with the Sunset Construction Company. I think I attended one or two meetings of the Sunset Construction Company in the early part of 1916 and latter part of 1915. I do not recall what matter came up at those meetings. I still own that stock. I received a written notice of these meetings from Mr. Chapman, an officer of the corporation. There were no officers elected at this meeting. I am not a director now, but I was a director for some period in 1915, until the company went out of existence and lost its franchise. I do not think there was any change in the directors at that time. [171] At the directors' meeting I voted my stock. I don't know what directors I voted for. I know at one meeting that Mr. Chapman resigned as a director, and I was elected in his place. I have no special recollection about th matter. I never intended to use my stock for making any changes in the directors of the corporation. I understood they had the same officers, Fill-

(Testimony of Arthur J. Meadows.)

more Buckman was Secretary and A. E. Buckman was Manager. I was not going to interfere with the management because I did not understand the work. I do not think there was a stockholders' meeting since I held the stock. I think it was a directors' meeting which I attended. At that meeting there was present, Mr. Chapman and Mr. Fillmore Buckman. Mr. Fillmore Buckman was Secretary. I do not think he was a director. Mr. McCoy was a director. I think he was at the meeting. I was notified to attend the meeting as a director. I have not got a copy of that notice. I understood that I was elected a director on the transfer of my stock.

I knew there would be no more indebtedness incurred after my connection with the Company because they were not running any bills. Everything that was purchased, and the labor, was paid in cash. Mr. A. E. Buckman stated that Mr. Rauer was advancing money so that everything could be paid for in cash. I also asked Rauer.

My collection business brought me from \$100.00 to \$150.00 and I thought if I could increase my income from \$75.00 to \$100.00 a month handling the business of the Sunset Construction Company, I thought I would then be having an income of about \$200.00 a month.

Mr. Rauer was a friend of mine. Mr. Rauer stated it would be safe for me to buy the stock. I could not lose anything because he was advancing money to pay for the work and when the work was

(Testimony of Arthur J. Meadows.)

finished there would be money to be collected on the bills due the Company. [172]

I remember that at the last directors' meeting that I attended the directors were Mr. Chapman, Mr. McCoy and A. E. Buckman. They were the directors.

The COURT.—Now, Mr. Meadows, you testified within the last five minutes that you were satisfied that Mr. Chapman resigned and you were elected in his place. Now was he a director at the time you attended the last directors' meeting?

The WITNESS.—I don't remember whether he resigned or not. I know that there was a resolution passed with reference to some work and I signed it.

I am not positive of the date of the meeting. It was the last of 1914, or the early part of 1916. I do not know what has been done since February of this year. I have not had anything to do with them since then. The corporation lost its franchise. I know there has been nothing done under contract since February of this year. This I know because their work is public work, and I can see what is being done from the records at the City Hall. I know that there has been nothing done under contract since February of this year because I have been out to the Hall and I know about the records and I know the work that has been done. I get my information as to what work they have been doing from the City Hall records because it all goes through the Board of Public Works. I do not get

(Testimony of Arthur J. Meadows.)

my information from the corporation records because I am not doing any business for them at all now. They stopped paying me any salary a few months before I ceased work. They said they were not making any money and that they were going to quit. At the time I quit they owed me about \$130.00, which I have asked Mr. Buckman to pay, and he always told me they were doing some work, and he would put me off saying that when they collected some money they would pay it. Mr. Buckman [173] said "Things are not going just right now, and there is no money on hand, the money is out on contract and they are not collecting the assessments. After I became the owner of the stock I would go up to the office and see what was going on, then see A. E. Buckman, and sometimes Mr. Fillmore Buckman.

The company had some machinery, scrapers and cars. There was a mortgage on this machinery, and I knew there was very little equity in it. I knew that this machinery would not bring 5¢ on the dollar for what they paid for it. It was in such a dilapidated condition. I recommended they should spend some money for repairs in order that they should keep the plant in working order.

On cross-examination by Mr. ANTHONY.

At the time I purchased the stock I was aware that the Sunset Construction Co. owed a great deal of money, and I was aware that it had given a chattel mortgage on all its tools and implements and fixtures and stock in trade. Since I have been

(Testimony of Arthur J. Meadows.)

connected with the company they have been winding up their affairs, trying to get some money out of the work that they had done in order to pay off this indebtedness and the mortgage on the plant.

Since my connection with the company, the company has done considerable street work in San Anselmo, Marin County, and in the Richmond District they were grading a block on 22d Ave., and on the Lincoln Highway, and also some work in Burlingame, and other small jobs, also some work in the Sunset District, and in doing such work labor and material was required.

The COURT.—That work and those contracts necessitated the incurring of obligations, didn't it?

A. Yes, for labor and material. [174]

The COURT.—But you testified here a short time ago that you bought that stock because you knew they were doing nothing that would enable them to incur any obligations.

A. Because I inquired of Mr. Rauer if he would continue to advance money to the company. I bought the stock simply on the assurance of a third party that he was going to advance all necessary expenses to carry on the work. That he would continue to advance the money for labor and material.

I was told by Mr. Rauer that he was going to advance some money to pay for the labor and materials. I do not know whether there was a written contract wherein he agreed to do so. Mr. Rauer advanced money to buy material. I used to go to Mr. Rauer for orders to buy material and go to

(Testimony of Arthur J. Meadows.)

him for money to pay the pay-roll. I could not get any materials without a written order from Mr. Rauer. I could not get any credit in the name of the corporation.

Redirect Examination by Mr. LANE.

The contract at San Anselmo was begun in September or October of last year. The contract at 19th & Kansas Streets in the city was taken the latter part of the year, and was in progress when I quit the employment. The Richmond contract at 14th Avenue, was taken a long time ago, but they did not start the work for a year after the contract was let. It was a private contract for Heyman Bros. The Carolan Estate work in Burlingame was taken the early part of last year and was in progress.

I saw the prices when the contracts were awarded. I could not tell you just the amounts. I could tell you that the Carolan contract amounted to \$12,000.00 or more; there was extra work to do. The San Anselmo contract amounted to somewhere between \$8,000.00 and \$9,000.00. The 19th & Kansas amounted [175] to about \$10,000.00 or \$11,000.00, and the Richmond contract about \$1,800.00, and the 22d Avenue and Lincoln Way, Sunset, about \$4,000.00. I believe there was a profit in these contracts. I do not know what the profit was.

Testimony of Fillmore Buckman, for Plaintiff (Recalled).

Mr. FILLMORE BUCKMAN was recalled and again interrogated by Mr. LANE.

I recall the stock certificate book you show me as that of the Sunset Construction Co. The first entry is a certificate for 50 shares issued to F. W. Simmie on April 19, 1910. The second Sunset Construction Company was organized in 1911. This was so organized because they lost their franchise for the nonpayment of taxes and had to reincorporated. They reincorporated under the same name, and the only reason for reincorporating was on account of the nonpayment of the franchise taxes.

Mr. LANE. Q. That stock certificate book then has nothing to do with the present Sunset Construction Company?

A. No, because the Sunset Construction Company was reincorporated, and, of course, they issued new stock at that time.

I was not secretary at that time and don't know anything about the leaves in the book being torn out.

Turning to that portion of the book where the stock certificates of the present Sunset Construction Company are, we find that the first certificate is one share issued to A. E. Buckman, on April 23, 1915; the corporation was organized in April, 1911. According to that, the stock was taken up and new stock issued.

(Testimony of Fillmore Buckman.)

There was a Sunset Construction Company that was organized last year, and the first certificate of stock was issued in December, 1911. There were 50 shares to A. E. Buckman, and then there were 50 shares to J. Morey on the same day; and also 50 [176] shares to W. H. Chapman on the same day; and then there were 10,000 shares on the same day to W. H. Chapman, J. Morey and A. E. Buckman, trustees for the Sunset Construction Company, and on the same day there was one share issued to J. Morey; 49 shares to J. Morey, as trustee for Buckman, and on the same day one share to W. H. Chapman; and on the same day, 49 shares to W. H. Chapman, trustee for Mr. A. E. Buckman. Those certificates are all dated December 15, 1911. The last entry was on April 23, 1915, when one share was issued to A. E. Buckman and one share to J. Mowry and one share to A. J. Meadows, and one share to W. H. Chapman, and 10,196 shares to A. J. Meadows, all on April 23, 1915.

There is a notation on the last stub of that book as to what stock was turned in for new certificates. I was secretary at the time, but I didn't write that, it was written by Meadows. I do not know what the consideration for the issuance of that certificate for upwards of 10,000 shares was.

Testimony of Sam M. Phillips, for Plaintiff.

SAM M. PHILLIPS, called as a witness for the plaintiff, then testified in substance as follows:

I was one of the attorneys for the Trustee in

(Testimony of Sam M. Phillips.)

Bankruptcy of A. E. Buckman, and was such in the latter part of 1915. At that time the Referee in Bankruptcy made an order directing the secretary of the company to bring into court and exhibit the stock transfer and certificate books of the Sunset Construction Co. I made a memorandum at that time which is on the slip of paper which you hand to me. I do not recall the month when that was made. This stock certificate book was examined by me at that time, and I made that list of the stock certificates which had been issued. It is on the slip of paper which you handed to me. The memorandum is made in my handwriting. The last stub in the stock [177] certificate book is dated April 22, 1915. That stub is not on the memorandum which I made of those certificates which had been issued at the time of my examination. That certificate had not been issued at the time I saw that stock certificate book. The stock was issued to A. J. Meadows. At the time I examined this book I initialed the cover and I still find my initials in it. On that occasion I examined Mr. Fillmore Buckman in bankruptcy and he testified that the salary of A. E. Buckman was \$150 a month and the books of the Company were brought into Court and showed that A. E. Buckman was drawing \$600 and \$700 a month in addition to his salary, as expense money.

Testimony of Jessie Morey, for Plaintiff.

JESSIE MOREY, called as a witness for the plaintiff, testified in substance as follows:

Certain stock in the Sunset Construction Co. was issued to me, but I really never held that stock at all. I was simply a director for convenience. I am a stenographer in Mr. Chapman's office. Somebody else owned all the stock that was issued to me, but I don't know who it was. I think I attended all director's meetings up to the time I resigned in July, 1915, but I do not know who was elected in my place.

Testimony of W. H. Chapman, for Plaintiff.

W. H. CHAPMAN, called as a witness for plaintiff, testified on direct examination in substance as follows:

I was one of the organizers of the Sunset Construction Company. One certificate was issued to me in my name as an incorporator, and I was the legal owner of it, but the beneficial ownership was in Mr. A. E. Buckman. I have no interests in the profits of the corporation. The stock was given to me simply [178] to act as a director. I was the attorney for the company, and the office of the company was in my office. The stock standing in the name of Miss Morey was in the same position as the stock owned by me. She acted for it, or rather for Mr. A. E. Buckman. The beneficial ownership of that stock was in Mr. Buckman. I

(Testimony of W. H. Chapman.)

was a director in the corporation until I resigned about the first of July, 1915. The directors who were elected in the place of Miss Morey and myself were A. J. Meadows and John McCoy. I think the last directors were A. E. Buckman, John McCoy and A. J. Meadows at the time the corporation expired, that is, forfeited its charter, in March of this year. It had previously forfeited its charter, and then other proceedings were had by which it was continued in existence until the second forfeiture of its charter.

Miss Morey and I were simply dummy directors.

I wrote the certificate of stock that was issued on the 23d of April, 1915. The entries were made on that day. I filled in the stock certificates, and on the same day Mr. Fillmore Buckman, who was secretary, signed as secretary, and put the seal of the corporation on. Then other certificates that have been marked in here, that have never been torn out, were not signed by the secretary, and were never in fact issued.

There is no question but what this was made on the date that it is here, that is, in my mind. Originally the corporation forfeited its charter some time in December for nonpayment of taxes, and we contemplated, when we incorporated, the issuance of the certificates shown in the books that are filled out but not signed by the Secretary, to be issued in the place of the old certificates, and the same number of shares [179] issued to the

(Testimony of W. H. Chapman.)

directors of the defunct Sunset Construction Company as trustees for the corporation, the 10,000 and odd shares; we afterwards learned that what we had done in reincorporating was practically a redemption of the right to act, and we went ahead, then, just as though there had been no forfeiture, and considered the old certificates as valid certificates of the corporation.

We did not issue any new certificates; only in lieu of cancelled certificates of the old corporation, all of these that are in here were to take the place of the old certificates, but they are still here, the same number of shares; also that certificate for 10,000 shares, in the name of myself, A. E. Buckman and J. Morey, they are still in the book. That was never issued. I intended to issue that in place of the old.

At the time that corporation No. 1 forfeited its charter, A. E. Buckman, J. Morey and myself were the directors of the old corporation. We were also the directors and incorporations of the new corporation. The original incorporators of the defunct corporation were Simmie, Lewis and J. Morey, and they resigned and Mr. A. E. Buckman and myself were elected in place of two of them. They were simply the first acting incorporators. Mr. Buckman and Miss Morey and myself were directors of the new company and of the old company; the directors were precisely the same.

That certificate for 10,000 shares is signed by

(Testimony of W. H. Chapman.)

Mr. Chapman as president, but it is not signed by the Secretary, and it is not removed from the book.

I would like to explain the absence of leaves in this book, in the first part of it. On the inside of the covering is a statement of a company; that was a corporation formed shortly after the fire, and this was an old stock certificate book of that corporation, and where these leaves had been torn out they [180] were issued for that corporation. They had nothing to do with the Sunset Construction Company. There have been no pages taken out of this book at all in reference to the Sunset Construction Company. At the time the first incorporation of this company was had these leaves were torn out in the front of this book, so as to use it instead of buying another book.

On cross-examination, W. H. Chapman testified as follows:

The original incorporators of corporation No. 1 resigned so that A. E. Buckman, J. Morey and myself became directors of the old corporation. Then, the last corporation, we three were the incorporators and remained the directors until July 1, 1915. On July 1 Miss Morey and myself resigned, and Mr. Meadows and Mr. McCoy were appointed directors in our place.

It was at the time the directors met on the 1st of July; I think Miss Morey resigned first and Mr. Meadows was appointed in her place, and then Mr. Meadows and Mr. A. E. Buckman were there

(Testimony of W. H. Chapman.)

present, and I resigned, and they elected Mr. McCoy; that was the way it was, it is my recollection.

Up to that time, at least, A. E. Buckman was the owner of all the shares of stock of the corporation and Miss Morey and I simply held a share each to qualify as directors.

On redirect examination W. H. Chapman testified as follows:

The stock of the corporation was not issued to Mr. Buckman, but he was the incorporator of the corporation and the owner of the assets. I don't think we had any stockholders' meeting except the original meeting of stockholders to adopt the by-laws. [181]

That is the only stockholders' meeting they ever had.

I could not say that there were any particular instructions given, but whatever business was needed to be done, of course, we were guided by Mr. Buckman's advice.

Mr. Buckman was made general manager, with full power to act. He could borrow money for the company, and I think execute notes for the company. It seems to me sometimes we passed special resolutions giving special power to him; I think we did that in the case of a chattel mortgage, and in some instances with Mr. Rauer. All those proceedings would be found in the minutes.

(Testimony of W. H. Chapman.)

On recross-examination W. H. Chapman testified as follows:

The Meadows stock was transferred to him on the 23d of April, 1915, and it was subsequent to that that I resigned and he was appointed. Prior to that I did not know he owned it. I had been told it had been sold, and he brought in the certificate to the office and asked for a transfer. I knew that that stock had been pledged to Mr. Rauer. I think that I delivered the certificate of stock to Mr. Rauer. Mr. Rauer loaned money to the corporation with which it carried on its business.

Testimony of A. E. Buckman, for Plaintiff.

A. E. BUCKMAN, called as a witness for plaintiff, testified in substance as follows:

I am the bankrupt. I pledged my stock in the Sunset Construction Company to J. J. Bauer. I pledged 10,150 or a little more of the shares of the company that I had. This pledge [182] was made in January, 1914. It was made for moneys advanced by Mr. Rauer to the Sunset Construction Company. We were borrowing money from Mr. Rauer to carry on the business. In making this pledge I just delivered the stock to Mr. Rauer. I could not swear positively, right now, but I believe there was a written instrument signed and delivered.

(Testimony of A. E. Buckman.)

The stock stood on the books of the corporation at that time in Mr. McCoy's name, if I remember right. I am not positive about whether it was the stock of the first Sunset Construction Company—it was the stock that I owned in the company, and I pledged it all with Mr. Rauer for money advanced to the Sunset Construction Company and used in their business, and not by me personally.

At the time we originally incorporated the company, the stock was issued in Mr. McCoy's name, and shares to Mr. Chapman and myself and Miss Morey—I do not know any special reason for it being in McCoy's name, but it was, though.

Mr. LANE.—It does not show in the stock certificate book of the new company. Since the second Sunset Construction Company was organized, there has been no issue of 10,150 shares of stock, and that I did not know until this morning. As Mr. Chapman stated this morning, they formed a new company, and without issuing any stock agreed that the stock issued in the old company should be the stock in the new company; so the only evidence of this stock is the certificate issued by the old company, which, at the time this company was formed, was defunct.

WITNESS (Continuing).—That was merely a pledge to Mr. Rauer for moneys he had advanced. We commenced borrowing money from Mr. Rauer, I think in 1911, and we kept drawing money at different times. We gave him notes or checks

(Testimony of A. E. Buckman.)

which we carried or assignments of money due us and stock in the company—the [183] books show. I was giving Mr. Rauer notes signed by myself as manager. The books will show the money that was got from him at different times. But that money was not advanced to me personally.

I was the incorporator of the company and owned the stock, all of it. Although it stood in the name of people as trustees, I owned the stock, was supposed to own it. I am a director of the Sunset Construction Company now, and the other directors are Mr. Meadows, Mr. McCoy, and myself. I have always been a director. I don't remember the date Mr. Meadows became a director, but I think it was July, or something, 1915. I don't remember the date; the books will show.

Thereupon the minute-book of the Sunset Construction Company was offered and admitted in evidence. Said minute-book contained no record or minutes showing the election, appointment, or other qualification of either A. J. Meadows or McCoy as director of the Sunset Construction Company.

WITNESS (Continuing).—The Sunset Construction Company forfeited its charter, I think in March, 1916, for its failure to pay the corporation franchise tax. I think that tax was some \$60, with some percentage added; I think they have brought suit to recover it; I am not sure. At the time the charter was forfeited Mr. Meadows, Mr. McCoy and myself were the directors.

(Testimony of J. J. Rauer.)

It was here stipulated that Mr. Buckman, Mr. McCoy and Mr. Meadows be brought in as parties defendant, in place of the Sunset Construction Company, the charter of which was forfeited after this suit was brought, as trustees of the Sunset Construction Company, and that the substitution may be had without filing a supplemental bill.
[184]

Testimony of J. J. Rauer, for Plaintiff.

J. J. RAUER, called for the plaintiff, testified on direct examination in substance as follows:

I am the man to whom Mr. Buckman pledged the 10,150 shares of stock in the Sunset Construction Company. The pledge was made in January, 1914, by a pledge note, and the stock was then delivered to me. I have here a copy of the note.

The COURT.—All you are litigating now is the ownership of the stock, I suppose.

Mr. LANE.—The ownership of the stock, and it is my contention that there has never been any valid pledge of this stock.

WITNESS (Continuing).—I was examined before the Referee in Bankruptcy in the spring of 1915. I did not testify that that pledge had been made merely by giving me the shares of stock of the Sunset Construction Company, and that I did not recall that there was any written instrument. On the contrary, I said this: that the concern owed me \$40,000 or \$50,000 and I had that stock pledged

(Testimony of J. J. Rauer.)

with other securities, and if they would pay me they would be welcome to it. The pledge was made in good faith, they gave it to me, and after that I advanced on that security, together with other security, and I told the Referee down there that.

At that time I also had a chattel mortgage on the personal property. It was not in my name; it was in the name of Mr. Wehrle, a relative of mine, but that mortgage is my property.

I took the deed in the name of my niece, because I do that often with loans; I had no reason for it. I have mortgages in different people's names, and then they transfer them to me. I have made that a custom for years, for no special reason at all. I did not do it to cover up property that really belongs to somebody else; not at all; the affidavit and mortgage show that it is their property, and they borrowed so much money; I thought [185] it made no difference who they borrowed it of, as long as they got the money.

Besides real property and this stock there were some contracts; they had a contract with Mr. Carolan that they thought they were going to make quite a sum of money out of, and when the matter got through they lost \$7,000 or \$8,000. Those contracts were assigned to me. I loaned about \$8,000 worth on the deed of the real property and my account gives credit for it.

(Testimony of J. J. Rauer.)

On cross-examination J. J. Rauer testified in substance as follows:

The first money transaction I had with the Sunset Construction Company was in the year 1911, and from that time to date they are indebted to me for moneys advanced. This is a book of original entry that I kept myself.

The COURT.—I am not going into an accounting of that kind. My theory of this case is that if this stock belongs to Buckman, a decree will go to that effect, and an accounting will be had; otherwise, I do not care anything about it. He admits that he simply holds it as a pledge, that it never was sold to him, that it was simply assigned to him. The only question is, whose property was it? If it was Buckman's property, they will be entitled to a decree, and then an accounting as to the present rights will be had before a Master.

WITNESS (Continuing).—The stock that was pledged to me on the \$20,000 note,—I sold it at open sale and gave notice before I made the sale. I served notice on Mr. Buckman and regularly held the sale on August 12, 1914. I did this under your direction, Mr. Anthony. I found that the concern was not satisfactory to me, and I did not want to be obligated to a large [186] number of creditors which they have now, and my contract was finished.

I had a formal sale of the stock, and the stock was purchased at that sale. I did not become the

(Testimony of J. J. Rauer.)

owner of that stock. I gave notice it was to be sold at 12 o'clock on August 12 at my office. I have no copy of that notice; I gave it to Mr. Anthony.

Mr. ANTHONY.—I have no copy of the notice; I gave it to Mr. Buckman.

Mr. BUCKMAN.—I have no copy of that notice that I remember of.

Testimony of Louise Brown, for Plaintiff.

LOUISE BROWN, a witness for plaintiff, testified in substance as follows:

I am a creditor of A. E. Buckman and of his estate in bankruptcy and have been such for over two years. My claim is based upon a judgment against him for \$15,000. Mr. Buckman stated to me in reference to my claim that before he would pay my claim he would see me in Hell first—before I would get one dollar of his money. He also said he would go through bankruptcy and would even go to State's prison before he would pay me. He said the same thing to my attorney, Herbert Choyński. Mr. Buckman hears me and knows that I speak the truth.

Testimony of J. J. Rauer, for Defendant.

J. J. RAUER, called as a witness for the defendant, testified on direct examination as follows:

The two signatures on the paper shown to me are the signatures of Mr. Buckman. I gave notice of the sale of the shares of stock under the pledge by written notice, and notifying them I would sell

(Testimony of J. J. Rauer.)

the shares. That notice was given two days before the sale. I told them verbally about it also. I told them I wanted to sell the stock. I did sell the stock. I sold [187] the shares for \$50.00, and I turned the shares over to the purchaser. The purchaser was Mr. Wherle. I actually delivered the stock to him and he paid me the money and since then I have not had possession of the shares.

At the time the Sunset Construction Company gave me the promissory note for which the shares were pledged by Mr. Buckman, the Company was owing me \$20,000.00, or more, and the note was given to secure the money I had advanced and to be advanced. After the note was given to me I advanced \$24,770.00 and I have advanced a shortage of \$10,000.00 more, and the dates and the amounts of these figures are in the papers you show me—these checks. These checks represent actual money from me. They would get money from me, and they would give me a check, saying, “Mr. Rauer, I am going to get money,” and then they would give me an assignment of their contract.

The Carolan job in Burlingame, they lost \$7,000; I did not get anything out of it, not a cent; at San Anselmo I went over there and loaned \$1,400, I paid every bill that there was against them for labor and material, and everything I lost. I have taken people’s word for getting money back, and, of course, I have done wrong. I let my judgment get the best of me.

(Testimony of J. J. Rauer.)

The actual loss was about \$24,000 or \$25,000 or \$26,000 that I did not get back. The greatest amount of indebtedness due to me at any one time was as high as \$55,000 or \$60,000. I have gotten some of that money back. If I was to figure it up I would have a loss of between \$24,000 and \$25,000; that is what I have been loser in five or six years.

An instrument purporting to be a chattel mortgage by the Sunset Construction Company, signed by A. E. Buckman, General Manager, and acknowledged by him with the usual certificate attached, [188] that it was not given to delay, hinder or defraud creditors, and prefaced by a general resolution of the Sunset Construction Company, authorizing the making of this chattel mortgage and the promissory note, was then introduced in evidence, the signatures of Mr. Buckman and Mr. Wehrle thereto and the instrument having been identified by the witness.

WITNESS (Continuing).—Mr. Wehrle is my brother-in-law, and he is the man this stock was sold to when I sold it. Then Mr. Wehrle in turn transferred it to Mr. Meadows. He is not connected with me in business. I have been out of business for six years, but I have had collections on different contracts that I turned over to him to make whatever money he could out of it. I have not been in the collection business for I think now four or five years.

Witness was then shown an instrument, the signature of which he identified as Mr. Buckman's, and which instrument purported to be a promissory note

(Testimony of J. J. Rauer.)

dated June 16, 1914, payable one day after date, for the sum of \$5,000, signed by A. E. Buckman, General Manager of the Sunset Construction Company, with the corporate seal attached; also another promissory note, dated June 18, 1914, made by A. E. Buckman, General Manager of the Sunset Construction Company, for the sum of \$10,000.00 in favor of H. Wehrle.

Witness testified that he gave these sums of money for the purpose of these promissory notes,—\$5,000 and \$10,000—and that as security had a mortgage on the plant. That is the chattel mortgage he is reading there, and those are the notes that accompanied the chattel mortgage. Witness testified that he foreclosed the chattel mortgage and purchased it for \$7,500, leaving a deficiency judgment.

The notes and mortgage were introduced in evidence. [189]

WITNESS (Resuming).—From March 29, 1915, up to the present date, I have had transactions with them.

They would get a contract, for instance, like Kansas Street, they would give me that contract, and I would file the assignment at the City Hall—they would get the work; they would say “I have taken that for so much a yard,” and I would go and ask some friend of mine, like Flynn & Tracy, and they would say there ought to be a couple of thousand dollars in it, and then there would something come along, like at San Anselmo, instead of making \$2,000 or \$3,000, there would be a loss of \$1300 or \$1600, but I had to go on and see it through.

(Testimony of J. J. Rauer.)

The Kansas Street work, that was a public contract. It was transferred in the City Hall, and the assessment issued to me. I lost money on it; it was not profitable.

The San Anselmo job was a public contract, the same way. It was assigned to me, and on the strength of that assignment I advanced the money for the doing of that work, and paid all the bills on that job,—every dollar—and there was a deficiency of about \$1,400 which I lost.

The Sunset Construction Company had its office on Post Street, in the second story of the Lick Building. I did not have my office there. I never had my office with the Sunset Construction Company. I had nothing to do with the Sunset Construction Company's office. I did not have any supervision of the accounts of the Sunset Construction Company. I had nothing to do with it, nothing at all. Mr. Fillmore Buckman acted as bookkeeper of the Sunset Construction Company and collected moneys for them. I never heard anything about what salary Mr. Buckman was getting until I got in the bankruptcy court, when I ascertained that Mr. Buckman was receiving large sums of money. I told him he could get \$50.00 a week for managing this thing, and no more. [190]

Thereafter I had a general supervision of the accounts and I would not allow any more contracting of bills except in my name.

The office of the Sunset Construction Company

(Testimony of J. J. Rauer.)

is there yet. I did not do anything in regard to the rent; I had nothing to do with it.

By saying I supervised the bills and everything with reference to it, I mean I paid for the material and paid for the labor; it was all charged to me, and I have the bills for it right here in my hand. If I had not paid the bills I would have lost it all, I had to do it. I did not endorse the fact that Mr. Wehrle paid me \$100 for the stock upon the note that I held. I did not get \$100. I got \$50. I didn't endorse the receipt of the \$50 on the note. [191]

Thereupon the Court made its interlocutory decree and order of references as follows, viz.:

(Title of Court and Cause.)

“Interlocutory Decree.

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, viz.:

1. That A. E. Buckman at all times, and up to and on the 19th day of February, 1915, was the owner of all the issued and outstanding capital stock of the Sunset Construction Company, a corporation, and that on said last-mentioned day said stock vested in and became, and now is, the property of R. Cords, Jr., as trustee of the estate of A. E. Buckman, bankrupt.

2. That A. E. Buckman at all times, and up to and on the 19th day of February, 1915, was the

owner of the Sunset Construction Company, a corporation, and of all of the property, books and records of said company, and that on said last-mentioned date said company, property, books and records vested in and became, and now are, the property of R. Cords, Jr. as trustee of the estate of A. E. Buckman, bankrupt, and that said property be held by said Cords pending an accounting between said company and defendants A. E. Buckman, J. J. Rauer, Filmore Buckman and Wm. H. Chapman.

3. That defendants A. E. Buckman, J. J. Rauer, Filmore Buckman, and Wm. H. Chapman severally account for all moneys or property received by them from, or advanced by them to, defendant Sunset Construction Company since the 12th day of December, 1911, whether such transactions were made in the name of third persons or in the names of said parties, for the purpose of determining what claims, if any, exist between said company and said persons. [192]

4. That for the purpose of taking such above-mentioned accounting said cause be referred to H. M. Wright, Master in Chancery of this Court, to take and examine said account and report thereon to this Court.

Dated, September 11th, 1916.

WM. C. VAN FLEET,
Judge of the District Court of the United States
for the Northern District of California."

Pursuant to said order of reference the testimony was heard before H. M. Wright, Master in Chancery, and the hearings were had on October 29, 30th, and 31st, November 2d, 6th, 8th, 16th and 30th, De-

ember 6th, 1919 and March 1st, 3d, and 10th, 1920, and at said hearings before the Master the parties hereto appeared, plaintiff being represented by Edwin H. Williams, Esq., and the defendant, J. J. Rauer, by Messrs. H. M. Anthony and M. J. Green, the following testimony was taken and evidence adduced, viz.: [193]

Testimony of J. J. Rauer, for Defendant (Recalled).

J. J. RAUER, called as witness for the defendant, testified in substance as follows:

The account which I present and which is marked Exhibit 1, was prepared by me from written data and from my books. From March 19, 1911 to November, that year, the Sunset Construction Company got indebted to me for \$15,000 which my books will show, and I demanded security. They conveyed some lots to me as security and as the interest I was charging was a little steep I permitted them to place a mortgage on the lots which they had conveyed to me. They realized \$6734.16 on that mortgage and paid me the money. That was the Straud mortgage. That left a balance of \$6,000 due to me and, long afterwards, I took an absolute conveyance of the lots which the Company had originally given to me as security and allowed them a credit of \$6000 to close the transaction. The dates of the receipt of the \$6,734.16 and the date of the credit of \$6,000 for the lots which were conveyed to me show in my account. I also have here a check for \$1500 dated July 11, 1917 which represents money I received from Taylor. This was money that came due to me on the account above mentioned. I loaned the

(Testimony of J. J. Rauer.)

money for the purpose of financing the street work contracts of the Company and the Taylor contract was done before 1912 but Taylor contended the money was not due from him until the work on the other side street was finished and so he did not pay the money until 1917.

That he started to lend money to Sunset Construction Company on March 19, 1911, and continued to lend it money until November 1916; that the accounts and the supplemental account which he prepared in accordance with the Master's order and which were introduced in evidence and marked Defendant's Exhibits 1 and 2, show all the transactions between himself and the Sunset Construction Company and that they are full, true and correct accounts of said transaction. [194]

These accounts show that the amount owing to J. J. Rauer by the Sunset Construction Company on account of said transactions on February 19, 1915, over and above all set-offs or credits that said Sunset Construction Company is entitled to, is the sum of \$36,807.04, and that the amount owing to J. J. Rauer from the Sunset Construction Company on account of the transactions between them since February 19, 1915, is the sum of \$18,561.54 after giving credit for all collections made by J. J. Rauer and all claims and credits that the Sunset Construction Company is entitled to, and that this sum of \$18,561.54 is outside of and beyond said sum of \$36,807.04 owing February 19, 1915, thus making the total sum owing to J. J. Rauer by the Sunset Construction Company on account of all transac-

(Testimony of J. J. Rauer.)

tions between it and J. J. Rauer since March 19, 1911, the sum of \$55,368.58.

The Sunset Construction Company never borrowed any money from Nat Boas directly, but all transactions covered by my account, were transactions where the money was borrowed directly from me, whether the money borrowed was my money or whether I borrowed it from Nat Boas, J. A. Miller or any one else. This transaction of \$8260 mentioned in the account was one where I obtained the money from Nat Boas and loaned it to the Company. The amount due me from the Company on December 3, 1913, was \$20,000 and the Sunset gave me its promissory note to cover this indebtedness. That was the full amount then due outside of these checks, dated May 20, 1914, for \$8,260. I did not make oath that the full amount due me from the Sunset Construction Company on December 3, 1913, was \$20,000 and the answer filed in this proceeding was not my answer. The balance shows on my books as \$20,000. The checks for \$8,260 came in after the date of that balance, so that it is correct that the full amount of the balances due me on December 3, 1913, was \$20,000 and that is the [195] amount shown on my books and alleged by me in my answer here on file to be the correct amount due. That is the amount due after striking a full account of all debits and credits prior to that date, December 3, 1913. On the date of that balance I held securities from the Sunset Construction Company, consisting of the fifteen lots which I have already mentioned and which were mortgaged to Straud,

(Testimony of J. J. Rauer.)

and also held an assignment of the moneys due from Taylor which I have mentioned. The Straud mortgage was for \$9,000 but I only got \$6,734.16 out of it. I have here an original assignment dated July 26, 1911, which shows the assignment as security from the balance due me from the Sunset Construction Company of the following contracts:

1. Contract of Dec. 4, 1910, made by Taylor Estate for grading certain lands in Outside Land Block 748.

2. Contract dated June 8, 1911, made by Joseph Estate Company for grading and improving streets in O. L. Blk. 744.

3. Contract with Sol Getz and other owners to grade, macadamize and curb 27th Avenue between I. and J. Streets.

4. Contract dated February 11, 1910, made by Sterling Realty Co. for grading O. L. Blk. 848 and improving streets. Subject to an order in favor of a bank for \$1,500.

The assignment witnesses that it was passed by resolution of the Company and is under its seal and executed by its officers. When I took over the 15 lots from the Sunset Construction Company we fixed their valuation by agreement between Mr. A. E. Buckman and myself.

The plaintiff introduced in evidence the verified petition of J. J. Rauer filed in this proceeding after the Federal Court had set aside proceedings on the chattel mortgage taken by J. J. Rauer in the Superior Court in which defendant Rauer requested the District Court to sell said property mortgaged.

(Testimony of J. J. Rauer.)

to him by the chattel mortgage and to foreclose the same, and which said petition was verified on November 13, 1916, and in which said [196] petition Defendant Rauer set forth that the amount owing to him from the Sunset Construction Company on March 15, 1915, and which amount was secured by said chattel mortgage was the sum of \$28,874.82.

J. J. RAUER further testified that the first note given him by the Sunset Construction Company on account of his advances was a note for \$15,000 to cover part of his advances, and that the first security given to him was to secure the payment of said note, and was by way of a deed to 15 lots of land, which lots of land the Sunset Construction Company had taken in the name of W. H. Chapman, their president, and which lots were conveyed as such security to Viola Clark, niece of J. J. Rauer's, for him and as security for the payment of said note for \$15,000.

That after the giving of said note and deed the Sunset Construction Company wanted to relieve itself of the high interest which it was paying to J. J. Rauer, and J. J. Rauer permitted the mortgaging of said lots to raise \$9,000 of which \$9,000 they paid him on account of said note and advances \$6,734.16, the Sunset Construction Company using the balance of said \$9,000 for the payment of prior liens against said 15 lots, and that the note secured by said deed by way of mortgage was by said transaction reduced by the sum of \$6,734.16; that there had also been assigned to him a contract from the Taylor Estate for the sum of \$1500 as further

(Testimony of J. J. Rauer.)

security for said note, which assignment had been made about the time of the execution of said note, but that the collection of said amount from the Taylor Estate was not made by him from the Taylor Estate until July 20, 1915. That on December 7, 1915, he agreed to accept in full payment of the balance of said note of \$15,000 so secured by said deed (and which balance was roughly figured at \$6,000) a quit-claim deed of said Sunset Construction Company for said lots; in other words, taking the [197] equity in the lots for the balance of the mortgage thereon thus closing out that transaction, said \$15,000 note being so settled by the application of the \$6,734.16 on January 25, 1912, and the Taylor Estate assignment of \$1500 and the said agreed value of the equity of \$6,000.

The Supplemental Account, Defendant's Exhibit 3, rendered and made by J. J. Rauer and testified to by him as correct was introduced on December 6, 1919, and is as follows, viz.: [198]

Defendant's Exhibit No. 3.
AMENDED AND SUPPLEMENTAL STATEMENT OF
J. J. RAUER ON ACCOUNTING.

		1911				
1911						
Meh. 9	Ck	#7805	\$ 490.00	Meh. 21	%	\$ 500.00
11	Dist.	"	10.00	May 17	"	475.00
May 17	Int. Miller		75.00	July 10	"	1000.00
" 18	Ck.	8390	400.00	22	"	500.00
June 15	"	8564	2500.00	Oct. 2	"	640.00
"	Dist.	"	150.00	" 25	"	640.00
27	Ck.	8632	1000.00	Nov. 10	"	640.00
July 11	"	8732	500.00	10	"	1000.00
27	"	8855	2955.00	1912		
"	Dist.	"	45.00	Jan. 25	" Mortgage	6734.16
Aug. 22	Ck.	9029	1000.00	1915		
28	" Aug. 24/11	9051	950.00	July 20	Taylor Est.	1500.00
"	Dist.	"	50.00	Dec. 7	% Mortgage	6000.00

1913	From Page 3,		1913	From Page 3	
					\$11,201.00
Apl. 4	Ck. Miller		Jul. 30	%c	300.00
May 19	Ck. May 17/13	#1	" "	" "	1,500.00
" "	" Mar. 25/13	#12520	Aug. 1	" "	480.00
22	Note		" "	" "	160.00
June 2	Ck.	24	Sep. 5	" "	200.00
3	"	33	" "	" "	960.00
"	Dist.	33	25	Horse	90.00
Jul. 10	Ck.	86	Oct. 14	Automobile	525.00
15	Int.		Nov. 10	%c Boas	1,980.00
30	City Hall		" "	" "	1,500.00
30	Ck.			Allowance	64.00
"	City	116		Balance	12,500.00
Sep. 5	Automobile				
5	Horse				
5	City loan, Boas				
"	Dist.				

Nov. 10	Dempsey Horse	22.00			
15	"	20.00			
22	"	10.00			
26	"	2.50			
30	"	5.00			
Dec. 3	"	5.00			
		<u>\$31,460.50</u>			<u>\$31,460.50</u>
1914					
Jan 1	Balance	\$12,500.00			Balance
May 20	S. S. Co. Clk.	8,260.00	#5179		
Aug. 22	"	500.00	6301		
27	"	1,000.00	6285		
Oct. 5	"	1,310.00	6777		
13	"	800.00	6886		Entered from
14	"	750.00	6885		checks on
Nov. 12	"	1,000.00	7213		file in the
16	"	750.00	7290		Clerk's
Dec. 11	"	500.00	7592		Office.
1915					W. A. CLARK.

Oct. 16	"	6903	"	432.50	Aug. 31	"	2.25
1915					Oct. 1	"	75.00
Feb. 8	"	8256	"	330.50	Hittell Contract		
					Jul. 19	%	1,381.11
					"	"	4,140.34
					Carolán Contract		
				6.50			
				4.10	Jul. 8	%	300.00
				22.00	" 31	"	19.70
					"	"	91.85
					"	"	2,519.07
1916					"	"	1,191.67
Jul. 17	McKenzie filing suit			6.50	"	"	14.99
	"			3.00	"	"	537.47
	"			13.50	"	"	67.89
	"			2.10	Jul. 3	"	
	"			30.50			
	"			2.00	28th bet. I & J Contract		
1915					as per statement		\$4,102.80
May to	Carolán Contract:						
Aug.	as per account			4,559.69	McKenzie Contract:		
1915					1913, Jan. 31		
Feb. to	Hittell Contract:						
Aug.	as per account:			4,953.40	in full		300.00

1915		Balance	38,138.29
Feb. to	28th Ave. bet. I. & J. Contract:		
Oct.	as per account	5,048.09	
1915			
July	Academy of Science Contract:		
	as per account	588.85	
1915			
July	Lawton & 45th Contract:		
	as per account	165.50	
		<u>\$54,113.18</u>	
1915			\$54,113.18
	Feb. 18, Balance	<u>\$38,138.29</u>	
[203]		Forward to Page 6.	Page 5.

1915	Balance		1915	July 31 Mr. Phillips	\$ 600.00
				9 Reese	150.00
				12 Gissler	81.25
				Balance	37,307.04
					<u>\$38,138.29</u>
Feb. 18	Balance			Dec. Iverson	500.00
				Balance	36,807.04
					<u>\$37,307.04</u>
Feb. 18	Balance				<u>\$36,807.04</u>
[204]					
					Page 6.

26	Ristucci	)	2.25
26	Da Monte	)	12.00
26	C. Timonthy Cash		2.00
June 21	Meat, etc.	12	30.00
14	H. Downey	13	.80
14	P. Deyneka	14	7.05
14	McCoy Cash		5.00
May 27	Switching	15	2.50
26	Meats, etc.	16	30.00
28	" "	17	14.65
28	Powder	18	9.30
June 1	Meats, etc.	19	16.45
May 28	Gasoline Cash		1.90
June 1	Rappage (Cash		14.25
1	Dimmick (from		3.30
1	Fitzgerald (J. J. Rauer		11.80
2	Boswell	24	18.95
3	Barley & Meat	25	50.00
1	Labor	26	75.00
23	Shaw, C. Bal.	23	10.00

23	Bijord	17.85
23	Duggan	6.35
23	Daley	3.70
23	Cochran	4.30
23	Olsen	6.65
23	Antonelle	27 25.35
21	S. P. Co.	33 40.00
21	Graves	" 26.14
25	S. P. Co.	34 30.00
25	McMahon	" 15.25
26	W. E. Ellis	34½ 10.00
28	W. E. Ellis	35 122.50
July 28	Feed, etc.	36 24.00
June 28	McCoy	37 50.00
28	"	Cash 10.00
July 10	"	38 25.00
3	"	39 25.00
26	Waterhouse Co.	41 73.10

Aug. 31	R. White	42	9.75
Mar. 20	J. C. Kennedy	43	31.00
June 11	Meats, etc.	44	10.00
5	A. E. Buckman	45	10.00
11	"	46	5.00
20	"	47	5.00
22	"	48	5.00
	Forward		<u>\$4,469.69</u>

[205]

CAROLAN CONTRACT

June 22	A. E. Buckman	49	\$4,469.69
26	"	50	35.00
July 1	"	51	10.00
3	"	52	5.00
15	"	53	35.00
	PROFIT		5.00
			<u>182.95</u>
			<u><u>\$4,742.64</u></u>

No interest charged on this A/C for moneys advanced to complete contract.

[206]

\$4,742.64
(Page 1.)

\$4,742.64

\$4,742.64

Page 2.

1915		HITTELL CONTRACT		1915	
		#1	\$	July 19	%
Feby. 25	Pay Roll	2	93.30	" "	
Mch. 19	"	3	120.95		
22	"	"	171.20		
Apr. 10	"	4	234.60		
15	"	5	236.35		
23	"	5	170.35		
30	"	6	163.83		
May 8	"	7)			
18	"	")			
25	"	")			
31	"	")			
June 9	"	")	1,681.80		
17	"	")			
25	"	")			
30	"	")			
Jul. 10	"	")			
Feby.	Stock Hire		12.00		
Mch.	"		43.50		
					\$1381.11
					4140.34

Apl.	"		250.00
May	"		328.50
June	"		306.00
July	"		166.50
Aug.	15	Enterprise Elec. Co.	100.00
	16	" "	85.00
Jun.	9	Meese & Gottfried	39.00
	15	Enterprise Elec. Co.	100.00
	19	Meese & Gottfried	29.29
	20	" "	12.45
	26	Marshall Newell	10.90
	32	Machine Batt.	13.00
Jul.	10	D. English, labor	9.00
	14	E. J. Morser	15.00
	"	Meese & Gottfried	29.29
	23	H. N. Cook Co.	8.60
June	26	P. G. & E. Co.	65.30
	"	" "	20.00
	"	" "	24.00

Jul.	23	Meese & Gottfried	41	24.10
	28	"	42	2.20
	31	"	43	27.54
Jun.	11	Labor	44	15.00
	10	"	45	72.55
May	6	F. S. Buckman	46	45.00
June	28	"	47	22.85
Jul.	31	"	48	25.00
	30	A. J. Meadows	49	10.00
	21	"	50	20.00
	16	"	51	15.00
	26	"	52	15.00
	25	A. E. Buckman	53	15.00
	"	"	54	20.00
	29	"	55	5.00
		PROFIT		568.05
				<u>\$5,521.45</u>

No interest charged in this account for Moneys advanced to complete contract.

[207]

\$5,521.45

Page 3.

28TH AVE. BETWEEN I. & J. CONTRACT.

		1915			
1915					
July	Pay Roll				\$ 385.00
Aug.	" "	\$ 639.25	Oct. 1	Meyers	
Sept.	" "	974.55	1	Mrs. Richmond	10.00
Oct.	" "	1029.80	Dec. 3	" "	10.00
July	Stock Hire	101.15	Oct. 1	J. F. Block	50.00
Aug.	" "	429.00	1	Isendorfer	100.00
Sept.	" "	565.50	4	J. F. Block	50.00
Oct.	" "	618.00	4	M. Baudette	250.00
		76.50	28	Sarah Evans	275.00
July 14	Line and Grade	27.00	28	M. Egan	500.00
Aug. 15	Meese & Gottfried	15.65	Nov. 6	J. F. Block	50.00
6	" "	29.05	23	" "	50.00
21	Hall El. Co.	20.00	Dec. 3	" "	50.00
25	" "	12.40	Nov. 6	M. Sproutt	10.00
Sept. 12	Meese & Gottfried	16.00	Dec. 3	" "	10.00
2	Con. Steele Co.	10.50	Nov. 6	S. Coons	20.00
2	P. Koenig	17.85	Dec. 2	" "	20.00
2	" "	134.00			

July 16	Sac. Brick Co.	17	9.00	1916		
17	" "	17½	2.25	Jan. 8	M. Sproutt	10.00
13	Gladde & McBean	18	113.00	Feb. "	"	10.00
Sept. 17	Examination	21	16.00	Mar. 9	"	10.00
	Great Western	23	21.85	Apl. 10	"	10.00
July 31	Hall El. Co.	24	20.00	May 8	"	10.00
Sept. 20	Gladde & McBean	25	149.79	June 10	"	10.00
				Aug. 16	"	10.00
				Oct. 19	"	20.00
				Dec. 15	"	20.00
				15	Mrs. Richmond	10.00
				Jan. 6	J. F. Block	50.00
				14	Meyer	15.00
				17	J. F. Block	85.00
				Oct. 4	"	150.00
				Jan. 22	Jas. Smith	100.00
				Oct. 4	L. Samuels	250.00
				"	Hammond	125.00
				Jan.	Mrs. Samuels	125.00
				Dec. 3	L. Meyers	75.00

Feb. 3	S. Coons	20.00
Mar. 6	"	20.00
Jan. 31	"	20.00
Apl. 5	"	20.00
June 10	"	17.50
28	Jas. Smith	347.70
18	"	100.00
14	" Aug. 1/16	49.60
0	"	106.00
	} Mrs. Joy	300.00
	Mrs. Richmond	20.00
	"	10.00
	"	10.00
Mar. 28	"	10.00
May 1	"	10.00
June 2	"	10.00
July 12	"	57.00

LAWTON & 45th AVENUE.

		1916		
Norton Suit	\$ 9.50	Dec. 24	Georgia Brown	\$181.00
Biggs "	9.50	" "	" "	139.00
Notary fees	2.00	Mch. 28	Norton	75.00
Calendar " (2 suits)	4.00	Jan. 29	Briggs	75.00
Atty. fees	30.00	1915		
Reporter fees	2.50	Dec. 5	Mrs Cassidy	118.00
Team Hire	100.00			
Examination	8.00			
PROFIT	422.50			
	<u>\$588.00</u>			<u>\$588.00</u>
				Page 5.

(Testimony of J. J. Rauer.)

J. J. RAUER further testified that on December 12, 1913, an account was struck between him and the Sunset Construction Company which showed that at that time they were owing him \$20,000.00, for which they gave their promissory note, and besides owing him unpaid checks of \$8,260.00 and \$3,000.00.

That at said time he took a pledge of the stock of the Sunset Construction Company owned by A. E. Buckman, as security for said promissory note of \$20,000; that besides it was his practice in advancing money on any jobs to the Sunset Construction Co. to take an assignment of the contract for that job.

That in June, 1914, the pledge of the stock not appearing sufficient to him, he had the Sunset Construction Company execute to him two promissory notes—one for \$5,000.00 and one for \$10,000,—to partly cover the indebtedness owing him by the Sunset Construction Company and had the Sunset Construction Company give him a chattel mortgage securing the payment of said notes, which said chattel mortgage mortgaged all the equipment and personal property of the Sunset Construction Company as security therefor; that this mortgage was made in the name of H. Wherle, as trustee for him.

That up to the time that he took the \$20,000.00 note and the check for \$8,260.00, and the check for \$3,000.00 as a settlement of the account between them, which was December 12, 1913, he had kept regular books and charged everything up, but

(Testimony of J. J. Rauer.)

that after that date when they would borrow more money from him, he would simply give them the money, or his check, and take their check in return, and that the \$10,000.00 and \$5,000.00 notes were given to partly evidence the checks that he so held against them, and which in that manner could be secured by the chattel mortgage. [210]

The \$20,000 note covered the full amount of the indebtedness due me from the Sunset Construction Company on December 3, 1913, but I took two other notes, one for \$5,000 and one for \$10,000 in order to hold collateral. I took stock as security for the \$20,000 note and when the security was not justified I took a chattel mortgage. I held three promissory notes and they represented the same indebtedness, but I held different collateral. I collected interest at $1\frac{1}{2}\%$ a month for a time up to the execution of the note for \$20,000 and afterwards at the rate of 2% a month. That is I tried to collect interest, I charged it up. I did not actually receive monthly payments of upwards of \$400 a month as interest on this account from December, 1913, to the end of the year 1914. I don't remember receiving any interest during that period. I just charged it up on my books. I did not collect \$400 a month interest on the \$20,000 note. I never got a ten-cent piece interest on that note. The check number 723, dated July 3, 1913, made by Sunset Construction Co. to A. E. Buckman was endorsed over to me by Buckman. I endorsed that check and got the money on it. It is marked, 'Paid July 21, 1913.' " Thereupon there was introduced in

evidence checks of the Sunset Construction Company, drawn on the Merchants National Bank at San Francisco, endorsed over to J. J. Rauer, and marked "Paid" by the bank, of the following numbers, dates and amounts:

Number	Date, 1913	Amount
202	May 31	\$400.
201	"	200.
212	June 2	25.
227	June 3	300.
229	June 3	200.
460	June 20	500.
461	June 13	500.
665	June 25	250.
671	June 26	450.
723	July 3	3000.
724	July 3	100.
841	July 10	100.
1030	July 23	460.
[211]		
1031	July 22	300.
1040	July 24	750.
1088	July 30	160.
1089	July 30	200.
1117	Aug. 2	3000.
1272	Aug. 6	480.
1275	Aug. 6	225.
1284	Aug. 9	500.
1304	Aug. 11	500.
1461	Aug. 21	500.
1470	Aug. 22	1154.64
1650	Sept. 10	500.

Number		Date, 1913	Amount
1791		Sept. 15	440.
1811		Sept. 17	600.
1815		Sept. 18	940.
1857		Sept. 24	525.
1865		Sept. 25	230.
2036		Oct. 7	650.
2043		Nov. 11	2000.
2244		Oct. 23	250.
2384		Oct. 27	985.
2407		Nov. 1	255.
2444		Nov. 6	1280.
2658		Dec. 15	250.
2659	1914	Jan. 16	250.
2663	1913	Nov. 18	200.
2849		Nov. 28	300.
2869		Dec. 3	350.
2877		Dec. 5	200.
3070		Dec. 13	400.
3071		Dec. 13	64.
3313		Dec. 29	34.
3527	1914	Jan. 25	400.
3706		Jan. 21	80.
3707		Jan. 21	350.
3775		Jan. 30	250.
3930		Feb. 5	395.
3987		Feb. 16	400.
4117		Feb. 19	400.
4128		Feb. 24	80.
4327		Mar. 11	250.
4337		Mar. 16	450.
4501		Mar. 24	80.

Number	Date, 1914	Amount
4506	Mar. 25	300.
4518	Mar. 30	330.
4644	Apr. 3	500.
4645	Apr. 1	15.
4655	Apr. 3	500.
4830	Apr. 16	400.
4844	Apr. 20	80.
4845	Apr. 21	400.
4970	Apr. 28	78.
5001	May 4	500.
5002	May 7	750.
5018	May 7	770.
5149	May 16	30.
5156	May 16	500.
[212]		
5167	May 20	500.
5180	May 20	130.70
5183	May 20	30.70
5507	June 11	1000.
5511	June 11	100.
5555	June 18	100.
5561	June 19	300.
5706	June 20	180.
5940	July 20	165. (N. S. F.)
5941	July 20	125.
6036	July 21	14.90
6191	Aug. 15	64.
6193	Sept. 5	400.
6290	Sept. 4	400.
6533	Sept. 15	400. (N. S. F.)
6558	Sept. 21	165.20

(Testimony of J. J. Rauer.)

Number	Date, 1914	Amount
6580	Sept. 25	230.
6588	Sept. 28	230.
6678	Oct. 1	300.
6682	Oct. 3	180.
6778	Oct. 5	3000.
6905	Oct. 17	275.
6931	Oct. 23	162.50
6932	Oct. 23	165.
7250	Nov. 21	165.
7586	Dec. 11	500.
7602	Dec. 15	525.
7609	Dec. 20	165.
7611	Dec. 21	500.
7703	Dec. 23	500.
8047	Jan. 27 1915	66.07
8271	Feb. 11	300.
8537		495.
8708	Apr. 1	450.
8716	Apr. 2	500.
8818	Apr. 6	350.

WITNESS.—“I collected the money on all those checks which are marked paid and which are endorsed over to me. The ones endorsed Rauer’s Law & Collection Co. I collected the money the same as on mine. I also collected on the ones endorsed Judas Boas. I will account for every one of the checks which you introduced in evidence. After the balance of \$20,000 was struck and the note for that amount executed to me by the Sunset Construction Company we kept our accounts by ex-

(Testimony of J. J. Rauer.)

changing checks. The \$20,000 note which was executed to me covered the same indebtedness as the \$15,000 note executed to me theretofore and endorsed by Wm. H. Chapman, but the security on the notes was different. I did not [213] cancel the first note when I got the second note because I didn't want to lose the security I had on the first note.

Q. Why was it you took that note executed by A. E. Buckman instead of having it executed by the Sunset Construction Company?

A. There was really no reason for it. He was really the whole shooting match.

That note was executed by A. E. Buckman, not by the Sunset Construction Co. Later I got the two notes secured by chattel mortgage, one for \$10,000, the other for \$5,000. I took assignments of accounts due the Sunset Construction Co. from A. E. Buckman right along. I took all the security that I could get. I never kept any record of the securities which I received. I received the \$4,273.93 listed by me on page 6 of the list of credits in my account, Exhibit 1, under the heading "28th Avenue between J. and K. Sts." Those accounts were assigned to me as security and I collected them. I haven't got that assignment. The Sunset Construction Company also assigned to me the collections due them on the Hittell contract. The chattel mortgage I have referred to was executed to H. Wehrle, but it was mine. Wehrle took it as my trustee. At the time I took that mortgage I held

(Testimony of J. J. Rauer.)

a great many unpaid checks executed to me by the Sunset Construction Co. The checks were not cancelled when I took the notes secured by that mortgage. The \$15,000 secured by the chattel mortgage were notes covering the same indebtedness as that represented by the \$20,000 note executed to me by A. E. Buckman. I took as security the 15 lots, the stock, and the chattel mortgage. The lots were security for the promissory note of \$15,000 executed to me by Wm. H. Chapman, the note of A. E. Buckman for \$20,000 executed to me in January, 1914, was secured by an assignment of stock, and the two notes aggregating \$15,000 executed to me by the Sunset Construction Co. were secured by a chattel mortgage. I brought an action in the Superior Court of San Francisco to [214] foreclose that chattel mortgage. The defendants gave me a voluntary appearance in the action. It is stipulated that the action was filed June 22, 1916, that the defendants in the action gave a voluntary appearance on the following day, and that on June 24, 1916, a decree was entered in the action by the consent of the parties." Thereupon there was introduced in evidence the decree referred to, being in an action in said Superior Court brought by H. Wehrle, Plaintiff, vs. J. McCoy, A. E. Buckman, and A. J. Meadows, as Trustees for the Sunset Construction Co., and the stockholders thereof, being action No. 74,716, reading in part as follows:

"On the 16th day of June, 1914, at said City and County of San Francisco, the defendant,

Sunset Construction Company, made and executed its certain promissory note in writing for the sum of \$5,000 for value received therefor, in favor of H. Wehrle plaintiff above named, as set forth in plaintiff's complaint, and, on said 16th day of June, 1914, said Sunset Construction Company, to secure the payment of said promissory note, executed and delivered to said plaintiff, its certain chattel mortgage in the words and figures set forth in plaintiff's complaint. That thereafter and on the 18th day of June, 1914, said Sunset Construction Company made and executed its certain promissory note in writing to plaintiff, H. Wehrle, for the sum of \$10,000 for value received, as set forth in plaintiff's complaint.

On the aforesaid two promissory notes there is now due and payable from the Sunset Construction Company to plaintiff the sum of \$10,000 and the personal property mentioned and secured by said chattel mortgage is now of the value of \$7,500.

That since the commencement of the above-entitled action defendants have delivered to plaintiff the possession of the following described personal property mentioned and secured by said chattel mortgage * * *

3 hay wagons, 3 stick wagons, 7 self-dumping carts, 2 buggies, 1 manure wagon, 1 dump cart, Q cart, 10 four-horse Fresno scrapers, 6 wheel scrapers, 3 two-horse Fresno scrapers, 1 two-horse roller, 4 sand machines, two 20 H. P.

(Testimony of J. J. Rauer.)

motors, one 30 horse-power motor, one 5 H. P. motor, 71 iron Koppel cars, 24 wooden cars, 519 sections (15 foot) Koppel track, 7780 feet 9-switch Koppel track, 3 plows, 4 plow chains, 11 sets 3 up lead bars, 26 sets 2 up lead bars, 9 car chains, 2 drill presses, 3 vises, 1 pipe cutter, 3 pipe wrenches, 1 bellows, 1 blower, 4000 feet electric wire, 1 range and camp outfit, crockery, utensils, etc., 2 horses, [215] 4 sets double harness, 3 sets single harness, drills, 1100 feet pipe, tools, instruments, buildings, etc.”

WITNESS.—“To the best of my knowledge and belief the account which I have filed here contains an absolutely full record of all moneys which I have received from the Sunset Construction Company or from any other person on their account. The property described in that decree was the same property afterwards sold in bankruptcy of A. E. Buckman. Buckman and I agreed upon the valuation of that property at \$7,500. I bid \$3,700 for the property in bankruptcy that is, Mr. Miller bid it in for me, as my trustee. I still have checks of the Sunset Construction Company executed to me that have never been paid. I took them to witness the amount of money which they owe me. When they got money from me they gave me a check to witness the amount. I held the check until there was money in the bank to pay it and some of these checks have never been paid. I made charges against the Sunset Construction Company in my

(Testimony of J. J. Rauer.)

books until this balance of \$20,000 was struck and after that I took checks when they borrowed money and held the checks to witness the amount that I loaned them. These checks were exchanged as they made payments on account, but I always held checks to show the balance due me. I hold the following unpaid checks against the Sunset Construction Company.

Number	Date, 1914	Amount.
4179	May 20	8,260.
6285	Aug. 22	500.
6301	Aug. 27	1,000.
6777	Oct. 5	1,310.
6885	Oct. 14	750.
6886	Oct. 13	800.
7213	Nov. 12	1,000.
7229	Nov. 16	750.
7592	Dec. 11	500.
7924	Jan. 11 1915	2,714.95
7938	Jan. 19	2,000.
8355	Feb. 16	1,000.
[216]		

Also the following issued after the date of the bankruptcy of A. E. Buckman.

8555	Mar. 15 1915	644.59
8671	Mar. 23	495.
8888	Apr. 9	500.
9019	May 1	650.
	May 15	896.40

The document which you show me is a petition to sell personal property entitled in this action

(Testimony of J. J. Rauer.)

and produced from the files of the clerk of this court. That document is signed by me and I swore to it before a notary public. In that petition I state as follows:

‘Petitioner represents that on the 9th day of March, 1911, he loaned the Sunset Construction Company \$500, and thereafter loaned the said company various sums of money at different times, aggregating on the 15th day of March, 1915, the sum of \$105,615.84 upon which there has been paid back to the petitioner the sum of \$76,741.02 leaving a balance of \$28,874.82; that all of said sum is secured by the chattel mortgage hereinafter mentioned.’

I stated an account with A. E. Buckman about March 15, 1915. I did not go over the account personally but I gave the data to Mr. Clark and Mr. Anthony and they made it up. The books show what the Sunset Construction Company owes me. Mr. Anthony got the data from my books. I can get all that data in 24 hours. The figures showing that the Sunset Construction Company paid me \$76,741.02 were secured from my books I think. The document which you now show me is an affidavit signed and verified by me before a notary public, and filed in this action, and in it I state as follows:

‘That affiant has loaned money to the Sunset Construction Company from time to time commencing with the 9th day of March, 1911, and the amounts thereof aggregated on the 15th

(Testimony of J. J. Rauer.)

day of March, 1915, according to an account stated on that date, the sum of \$105,615.84 upon which there has been paid back to affiant, up to that said last date, the sum of \$76,741.02, leaving a balance due of \$28,874.82.'

I swore to that statement. Mr. Anthony sat down with me and we [217] went through the books and got what the total was and upon that information I made that statement. I must have looked over the account and found that to be the amount of the debits and the credits. I can probably get the statement that that was based upon. I didn't have an account stated with Buckman on March 15, 1915, but I meant, by my affidavit that he owed me that amount on that date. I got that sum from my books. The account is right here in my ledger; that is the book I got it from. That is the only account I have. After March 15, 1915, I made some of the collections from the Sunset Construction Company. I would collect the money and deposit it to my account in the bank and then give the company proper credit.

Q. Is there any explanation which you want to make why the amount that you have credited in the account to Sunset Construction Co. is some \$16,000 less than the amount that you have stated in your affidavit was paid to the Sunset Construction Co. prior to March 15, 1915?

A. I will have to run over the statement and see.

The MASTER.—The point is you file an account with no vouchers at all. I presume that if I had examined this carefully I would have thrown this

account out in the first place. Your vouchers should have been in.

Thereupon there was introduced in evidence the ledger of J. J. Rauer, showing the account between him and the Sunset Construction Company, a true copy of which ledger account follows herein:

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1911		1911	
Mar. 9	Loan	Mar. 21	To its a/c
May 17	J. A. Miller	May 17	"
18	To its a/c	July 10	"
June 12	Loan	22	"
27	Loan	Oct. 2	"
July 11	Loan	25	"
27	"	Nov. 10	"
Aug. 22	"	10	"
28	"	Jan. 18, '12	"
Sep. 21	"	25	
Oct. 17	"		
Nov. 1	"		
10	" Chapman		
13	"		
Nov. 15	Loan		

\$ 500.
 400.
 2650.
 1000.
 500.
 3000.
 1000.
 1000.
 640.
 640.
 640.
 1000.
 4000.
 2037.50

1912		1912	
Jan. 9	Ck.	1000.00	
9	"	1000.00	
19	"	1500.00	
19	Interest	45.00	
19	Discount	600.00	
20	Int. 15 M 2/18/12	225.00	
23	Loan	1500.00	
26	"	1250.00	
Feb. 1	"	730.00	To balance 15,000.
		<hr/>	
		26432.50	26,432.50
Balance forward		15000.	
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1912		1912	
Feb. 1	To balance	15000.	May 6 To its a/c 6,734.16
Apr. 11	Rec. deed Joseph to Chapman		
11	" Clark	1.70	7 " 172.50
May 7	Ch. Curran	1.70	25 Gillett Mtg. 500.
		215.	25 Bal. 15 M note 8000 661.74

9	Ck. 2/26/12	400.	July 31	To its a/c	1250.
21	Int. to 5/18/12 15000.	450.	Aug. 31	"	1650.
25	Loan	2000.	31	"	350.
June 17		1075.	Oct. 18	"	250.
July 15		1715.	21		1715.
29		1250.	21		2000.
Aug. 10		1650.	22		1000.
13		350.	26		450.
Oct. 14		1000.	Nov. 4		25.
14		1000.	4		2000.
17		252.	11		1000.
21		2000.	24	Profit & Ls.	2.
23		2450.			
26	Adv. Panama	25.			
28	Loan	1650.			
Nov. 11	"	2600.			
19	"	350.	24	By Balance	15625.00
					<hr/>
					35385.40

1911	Balance				15625.	
Nov. 25	Loan		Nov. 29	To its ac.	1250.	10.00
27	"		29		765.	750.
29	Jk. screw etc.		Dec. 2		7.50	5.
6	Loan		9		520.	500.
14	"		13		3700.	2500.
14	Ret. Ck. Panama		14		2500.	2600.
Jan. 27	'13 Loan		14		2100.	1250.
Feb. 8	Int. 15175		14		339.	350.
8	Loan		14		2075.	7.50
8	"		Jan. 14, 1913		1025.	1200.
			Feb. 14	To balance		20734.
					<hr/>	<hr/>
					29906.50	29906.50

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June 1		700.	June 2		300.
3		300.			
July 10		600.			
<hr/>					
July 15	Int.	29421.	" 15	Int.	
30	Ok.	90.	July 30	Cash	300.
		160.	30		1500.
		200.	Aug. 1		480.
	City Hall	1440.	1		160.
			Sept. 5		200.
Sept. 5	Automobile	525.	"		960.
	Horse	90.	25	Horse	90.
	City Loan	1980.	Oct. 14		525.
Nov. 10	Dempsey	22.	Nov. 10		1980.
			10	Balance	1500.
					13906.
<hr/>					
		33928.			

Nov. 15	Dempsey	20.							
22		10.							
26		2.50							
30		10.							
Dec. 6	Balance	20000.		Dec. 1	Transfer	Dempsey			164.50
3	Horse	125.		June 16					150.
May 16	Loan	8260.		16	Transfer				8260.
16		1020.		May 10	Cash				1020.
		400.		10					400.
		400.		16					400.
		2000.							2000.
June 3		2000.							2000.
8		500.		May 10					500.
10		300.		June 16	Getz				300.
11		300.		16	"				300.
May 20		920.		16	Transferred				920.
June 16		1000.			"				1000.

	100.	"	100.
	180.	"	180.
	1025.	Cash	1025.
Recording	1.90		1.90
Notary fees	3.		3.
Mtg.	10.		10.
Jack	12.	July 20 Payable	12.

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1914		
July 15	Loan	20000.
May 15		896.40
May 20		8260.
Aug. 22		500.
Aug. 27		1000.
Oct. 5		1310.
13		800.
14		750.
Dec. 11		1000.
11		500.

16		750.			
Jan. 11	1915	2714.95			
19		2000.			
Feb. 16		1000.			
Mar. 15		644.59			
23		495.			
Apr. 9		500.			
May 1		650.			
Apr. 19		1000.			
Aug. 12		350.			
	A. J. Meadows	10.	can.		
	Rent to Oct. 1	300.			
Dec. 26	Sale of personal property set aside	7500.	can.	Dec. 10 Credit	10,000.
				July 3, 1916 Sale Per. Prop.	7,500.
Aug. 12	1916 Jordan hay bill	205.	can.	Dowling etc.	7,139.63
				Unpaid Ass. 21 & 22	
				& B.	1,145.18
				Anthony	125.
				Jordan hay bill	205.
				Meadows	10. " [221]

Testimony of Fillmore Buckman, for Defendant.

FILLMORE BUCKMAN testified that he was the Secretary of the Sunset Construction Company,—kept its books; that on December 12, 1913, when the \$20,000 note was given to J. J. Rauer, an entry was made in the books of the Sunset Construction Company as follows:

“Balance due J. J. Rauer to this date, \$20,000.00—All other moneys due J. J. Rauer covered by checks and orders”

“That this latter entry referred to two checks, one for \$8,260.00—one for \$3,000.00 which are not included in the \$20,000.00 note.”

“It is stipulated by counsel that the checks introduced in evidence while Mr. Rauer was testifying show payments of interest by the Sunset Construction Company to J. J. Rauer, aggregating \$6,619. We kept a book which we called a ‘Black Book’ and in that I made entries showing the transactions between Rauer and the company. Many times we would issue checks to cover loans received from Rauer and when we came to pay the money back we would not have the exact amount shown on the face of the checks he held. So he would exchange the checks he held for new ones representing the difference between what we paid and the former balance due him. The checks he held were supposed to represent the amounts he had loaned to us. All the entries made by me in the Black Book were transactions of which I had personal knowledge and are correct entries. The first entry in the Black

(Testimony of Fillmore Buckman.)

possession witnessing the same indebtedness as that covered by the note. I don't know of any reason why he got duplicate acknowledgments of the same indebtedness except that he wanted to secure himself. Rauer took assignments of all the contracts on which he was advancing money to the company and we furnished him with statements of the company's affairs. The two notes referred to in the entry in the Black Book dated May 20, 1914, were respectively, one for 2200 dated April 29, 1914, and one for 1900 dated May 20, 1914. The check for \$3,960 there referred to was executed after the time when the \$20,000 note was made. By comparing the two entries in the Black Book dated Dec. 12, 1913, and May 20, 1914, respectively, I concluded that the full amount of the indebtedness due to Rauer on Dec. 12, 1913, was represented [223] by the note for \$20,000 and the two checks issued prior to the date of that note and aggregating \$3,200. I knew from day to day what checks were outstanding and in Rauer's possession. I got the data from my check stubs. I opened up a ledger account with J. J. Rauer in the books of the Sunset Construction Co. on July 31, 1913, and continued it, on the debit side until December 26, 1914. I personally banked practically all moneys received from Rauer and issued all checks for the company so I had personal knowledge of pretty nearly all the transactions had between them. The ledger account is not correct because I didn't know all the transactions. I sought to keep the ledger account to the best of my knowledge and ability. The ledger sheet shows a

(Testimony of Fillmore Buckman.)

balance due to Rauer on December 26, 1913, of \$21,490. The checks which we gave Rauer to hold were taken up regardless of their date or the order in which they were issued. The checks cancelled were those which happened to coincide with the amounts of money which we had available for payments. Rauer kept a list of the checks but the only list he could keep would be one which would show a great many paid checks along with those that happened to be unpaid. We kept no separate account of transactions with Boas in our ledger."

"I drew most of the checks of the Sunset Construction Company and signed them and kept the checks in numerical order, and whenever a check was issued I got a return on it; and I always knew what checks Mr. Rauer held."

Whenever the Sunset Construction Co. was prepared to take up a check it would simply pay Mr. Rauer the amount of money that it had available for that use, and in that manner would take up checks which he held aggregating the same amount. There is no way of telling which checks were held for a long time, or which checks were held for a short time. These checks that were delivered up and cancelled were those that happened to coincide [224] with the amount that the Sunset Construction Company had available for that payment.

Mr. Rauer kept a list of all the checks and whenever we paid a check, or had enough money to pay any part of the checks, we would probably get that check out of that list and take that up regardless of the date.

(Testimony of Fillmore Buckman.)

I do not think that Mr. Rauer knew how I kept the accounts or anything about what my entries were. I never charged the interest up until the check was actually taken up. We very seldom actually checked up. Of course, Mr. Rauer knew in an offhand manner. He would say, "Well, I see the account has gotten up to \$20,000.00 or \$34,000.00." Of course, mine would tally nearly with the amount, with the exception Mr. Rauer's would naturally show some interest, because he would charge up the interest. I never charged up the interest until the check was taken up.

I knew just what he had all the time because they checked off with the bank.

Assignments were made to J. J. Rauer of all contracts of the Sunset Construction Company whenever he would lend any money on them, or advance any money for the bank.

The directors of the first Sunset Construction Company which was dissolved in the month of December, 1911, and succeeded by the new Sunset Construction Company, were Mr. Chapman, Mr. Mowry, Mr. A. E. Buckman, and F. P. Buckman.

Q. You would call at Mr. Rauer's office and spend considerable time there?

A. I would go there whenever I wanted to get some money, I would go there early in the morning, and I would have to wait until he came—after he came I would have to wait. I would want [225] a certain amount of money, and I would have to go back in the afternoon again, and he would tell me he

(Testimony of Fillmore Buckman.)

expected to get some money in—I would have to wait around. That is how a great deal of my time was spent—waiting for money. That was the only business that I would transact with Mr. Rauer.

Mr. Rauer never attended any meetings of the Sunset Construction Company that I knew of. The meetings of the directors of the Sunset Construction Company were always held over in Mr. Chapman's office in the Foxcroft Building.

The contracts would be bid on data made up by Mr. Buckman for the Sunset Construction Co.—Mr. Buckman did all the figuring. Mr. Rauer had nothing to do with the matters. The only contracts Mr. Rauer would know of ahead of time would be if there was a job being bid on, and we would go over and get a certified check from him. Most of the jobs required certified checks, and it was seldom that the Company was in a position or had a balance that would handle it, and we would get a certified check from Mr. Rauer for the amount required.

Mr. Rauer never regulated the expenses of the Sunset Construction Co. The first time that Rauer knew anything about that was at the time that Mr. Buckman's account was brought up before the bankruptcy court. I remember that when the statement was read off, and Mr. Rauer came out to one of the sessions there, that he was alarmed about the amount that Mr. Buckman was getting. Mr. Buckman was allowed a salary of \$150.00 per month, and he was drawing all the way from \$500.00 to \$800.00 a month from the Company, and the rest would be

(Testimony of Fillmore Buckman.)

charged against him for expenses—and a great portion of this would be used for expenses.

Mr. Rauer commenced paying all the bills of the Sunset Construction Company on its contracts on March 20, 1915.

The account of Mr. Rauer shows certain items collected [226] by him after the date of Buckman's bankruptcy, February 19, 1915, which were for work done before that time. I believe that the Iverson collection of \$500.00 was one of those. I kept a little grey book which shows the amount of unpaid checks outstanding at any one time. This book shows that the amount of checks held out on February 17, to 24, 1915, was \$29,027.15."

Testimony of J. J. Rauer, for Defendants (Recalled).

J. J. RAUER further testified:

Mr. Fillmore Buckman would come down and say—"Can I get some money for the pay-roll or something," and I would say, "I have not got it—if you go down to Mr. Boas, I will see if I can get it." We would go down to Mr. Boas, and Mr. Boas would then say, "Allright." Mr. Fillmore Buckman would say, "It is five minutes to 12:00," and I would go down to the bank and hand him the money. Quite often this was the way these checks were drawn. I had an arrangement with Boas that he would get 1½%, but he takes no responsibility. If I lose I have to make good. I took the Sunset

(Testimony of J. J. Rauer.)

Construction Company check, and he charged the amount against my account.

In a great many cases it was necessary to have the money within an hour or two for the pay-roll. They did not want their bank to know that the Company was borrowing money from me at $11\frac{1}{2}\%$; they had no credit. A great many merchants borrow from me, and they do not want their bank to know where they get the money from.

I severed my connections with Graf and with the Rauer Law and Collection Agency on May 13, 1913, and had no further dealings with them, or either of them, after that. I have not been in that office since four times within five years.

After March 1915, I made some of the collections and the Sunset Construction Company made some. I cannot tell which ones they collected, but the moneys on account of these contracts [227] of the Sunset Construction Company which had been assigned to me, and which I was carrying out, and which I collected, I would deposit in my own account but give proper credit to the Sunset Construction Company on my books. I do not think I collected anything on any contract that I did not have a proper assignment of.

I never went over the books of the Sunset Construction Company and I never attended any meetings of the Sunset Construction Company. They would come over to me and want money, and I would ask them what they were doing, and they would show me that they had a job for so much, and

(Testimony of J. J. Rauer.)

on the strength of that I would give them more money.

I never knew what salary Mr. A. E. Buckman received. The first time I learned what Mr. Buckman was drawing from the Company was when I was sitting in the bankruptcy court, and Mr. Fillmore Buckman testified to it.

The rates of interest between me and the Sunset Construction Company were by agreement between Mr. Buckman and me. Mr. Buckman showed me the resolution of the Sunset Construction Company authorizing him to transact all business for the Company.

The minute books of the Sunset Construction Company were introduced in evidence and showed the existence of such resolution.

Testimony of W. H. Chapman, for Plaintiff.

W. H. CHAPMAN testified in substance as follows:

That he has been a director and president of the Sunset Construction Company since its inception, and also has been its attorney; that he had many dealings with the Sunset Construction Company where it would borrow money from him, and he would take its check for the money and hold this check for a few days—sometimes hold it for quite a while. [228]

When the first Sunset Construction Company forfeited its charter, the business and assets of that

(Testimony of W. H. Chapman.)

company were all transferred to the new by the directors of the old company, and the directors of the old company were to receive the stock of the new company as trustees for the old corporation. The stock certificates in the new corporation were never as a matter of fact issued. They were filled out and made ready for signature by the Secretary, but they were never signed. Then the new company went ahead with the business as though nothing had happened, without completing the transfer of the stock to the old corporation, and then the directors of the new company went along with the business of the new corporation.

Of the new company the first three certificates—50 shares each, were issued to the incorporators. Certificate No. 4, dated December 15, 1911, is for 10,000 shares drawn in favor of W. H. Chapman, A. E. Buckman and J. Maury, trustees of the Sunset Construction Company, the defunct corporation. That certificate was never signed by the secretary, nor had it the seal affixed. It was just kept in the books, and nothing further was done with it. The directors of the new corporation were the same as the directors of the old corporation.

The Master then made the following statement:

The question is whether the second Construction Company ever legally became a corporation. Undoubtedly it acted as a corporation; but if it was not a corporation the trustees were still continuing in the business; there would have to be either in terms or by implication of law, an assignment by

(Testimony of W. H. Chapman.)

the second corporation of the debts of the first in order to carry over those debts whether the books show them or not. [229]

Testimony of A. E. Buckman, for Defendants.

A. E. BUCKMAN, called as a witness for the defendants, testified, in substance, as follows:

I think there were writings transferring the assets and obligations of the first Sunset Construction Company to the second Sunset Construction Company.

After I filed my petition in bankruptcy the corporation went right along doing business.

All the money that we got from Boas Mr. Rauer procured for us and stood good for,—Boas getting 1½% and Rauer getting the other ½%.

Mr. Rauer had no supervision whatsoever over the affairs of the Sunset Construction Company. The only business he had with it was to loan money and finance us.

Sometimes Fillmore Buckman would go around with Mr. Rauer and get the money from Boas, and sometimes I would.

During the latter part Fillmore Buckman would attend to all of that matter with Mr. Rauer.

I would not discuss our business affairs with Rauer except to say, "I am going to bid on a job," and would want a check for probably so much. I had it figured out generally.

We would furnish Mr. Rauer with rough estimates of contracts on hand, uncompleted contracts,

(Testimony of A. E. Buckman.)

etc., to give him some idea of how things were going, but we would not do this very often.

The company was never declared a bankrupt—only I personally.

I think roughly estimating it the company owed Rauer \$40,000 at the time of my adjudication in bankruptcy. This was represented by notes and checks.

A. E. BUCKMAN. (Continuing.) At the time the order was given by the Court, I took Mr. Phillips and Mr. Laine and his bookkeeper down to the office at 62 Post Street, and I said, "Here [230] are the papers belonging to the Sunset Construction Company, there are some other papers, my own personal papers." We had an office next door, and I suggested that we get that office. I was on Market Street, the door was open, and some fellow came running up and said, "Somebody is over in your office tearing it to pieces and taking things out." I went back, and they said, "We will take everything before we get through." I went over and got Chapman, and Chapman went over and says, "What are you trying to do here?" They said, "We got an order to take these things out of here." Chapman took their word, and they took all these papers, and my own personal papers, and papers belonging to Peters—they took them all away, including contracts, checks and everything. They were all mixed up; it would take a month to segregate the work in such shape as we had it before.

Testimony of Benj. Boas, for Defendants.

BENJ. BOAS, called as a witness for defendants, testified, in substance, as follows:

I loaned money to the Sunset Construction Company, but these loans were all through Mr. Rauer. Mr. Rauer stood back of them. They were charged to him in my ledger cards. Mr. Rauer by his signature guaranteed the payment of all those loans in every case.

Testimony of W. A. Clark, for Defendants.

W. A. CLARK, called as a witness for defendants, testified in substance as follows:

I did not prepare any of the records in Rauer's books or in the books of the Sunset Construction Co. and am not personally familiar with any of the transactions witnessed by them. I went through the records and checked them up. I did not keep the original pay-roll books, and the transactions recorded therein occurred long before I was employed by [231] Mr. Rauer. The only knowledge I have of the matter is from reading the data on the cards.

I am a bookkeeper for Mr. Rauer. I also work for D. F. Cramer. The assignment of the Hittell contract was made December 14, 1914 to Mr. Rauer. The work was done in 1915. The first payment on that job was on May 22, 1915.

Mr. WILLIAMS.—We have no interest in it at all if it was done subsequent to Buckman's bankruptcy.

(Testimony of W. A. Clark.)

The 45th Avenue between A. and B. Streets was a contract that was signed after the bankruptcy. The moneys on this were all collected after Buckman's bankruptcy.

The Hartley, Carolin, Phelps, Reis and Van Clausen contracts were also either performed or partly performed and collected after Buckman's bankruptcy.

The first credit on the Carolan contract was Sept. 1, 1914. The first money Mr. Rauer advanced on that contract was the pay-roll of \$889.25 of May 15, 1915; and on May 22, \$723.35, and the next \$1287.90. Altogether Mr. Rauer has paid out on this contract \$4,469.69 and received \$4,422.64.

The advances made by Mr. Rauer on the Hittell contract commenced February 25, 1915, and ran up to the end of April. The first work done on that job was February 19, 1915. Mr. Rauer paid all the pay-roll of the Hittell job and handled that job.

On March 31st there was a contract for paving to Moran for 14th Ave. between A. B. and C. On April 16, 1915 a permit issued for the intersection of 14th Ave. between A. B. and C.

Mr. CLARK.—I told you I would agree upon your figures.

The MASTER.—I said the other day that this first amended account, since it was in the nature of a correction might be put in as an appendix to the argument, but I think I will let it go in now. I will give it an exhibit number. I don't know the next number in order, but I will call it defendants' Exhibit No. 3." [232]

**Testimony of Fillmore Buckman, for Plaintiff
(Recalled).**

Mr. FILLMORE BUCKMAN, recalled, testified in substance as follows:

The cash-book entry shows that on May 14, 1915, a check for \$1043.36 was received from Sol. Getz & Son, and turned over to Mr. Rauer. He paid us back \$889.25."

I went over the bill ledger of the Sunset Construction Company to see whether Mr. Rauer's account as to the jobs that were unfinished February 19, 1915, or were done after that date, was correct. And so far as I can state that supplemental statement of Mr. Rauer is a correct compilation.

I am familiar with the Academy of Science job. The work was done but a balance was retained by the Academy until we did certain back filling which couldn't be done until the building was completed. It cost about 500 to do this back filling. The Academy had retained a balance of \$300 which it paid to us when the work was done. We had a second job after that for the Academy which was done by the day, at so much a day. The pay-roll vouchers produced by Mr. Clark were for the day work done on the second job and were not for the work done under contract for which the balance of some \$300 was due to us. The money balance due on the contract job was received by Mr. Rauer.

The 14th Avenue contract was a contract in two portions—two contracts; one was for grading and sewerage—grading and paving. The grading and

(Testimony of Fillmore Buckman.)

paving was done by the Sunset Construction Company and collected for by it. Then it went on and there was another contract with Ned Moran for the construction of the sewer on that street after we completed the grading. Moran came along and put in his sewer and later on the paving and curbing had to go in there. That contract at that time was taken over by Mr. Rauer; he had all the collecting. This contract does not appear in the books of the Sunset Construction Company. This paving was done long after June, 1915. [233]

All the work that was being carried on prior to July first I handled the collections myself with the exception of those contracts Mr. Rauer had in his hands; and then even so, those jobs were collected by me and turned over; but the 14th Avenue paving had not been started when I was there. The grading on 14th Avenue which was that because that was prior to that I attended to all the collecting of that. There were at least two or three months as near as I can figure between grading and paving. The bills for the grading were gotten out on 14th Avenue contract along in April, 1914, and ran into February, 1915. Mr. Rauer had nothing to do with that; none other than the City's portion which we assigned to him. When the City's portion was due, of course that ran into 1915, but the bills were assigned to Mr. Rauer and collected by us; that is the 14th Avenue bill. The Sunset Construction Company had nothing to do with the paving part of 14th Avenue job between A. B. and C.; that was completed in May, 1915. I think Mr. Rauer made

(Testimony of Fillmore Buckman.)

a contract with the Federal Construction Company to do the paving on it. He sublet the work to it. He sublet the work for the grading and the balance of the paving and collected for that. It was along in May Mr. Rauer began to take over these contracts. There is nothing in our books as to this 14th Avenue paving contract. There is a voucher in our books No. 2342, dated May 10, 1915, of Henry Meyer for constructing granite curb and paving between A. B. and C. a total of \$784.70. I do not know whether that was made out before or after the work was done. Lots of these bills were made out long before the bills were due. I do not know why we sent out voucher 2365 for \$750 on May 10, 1915, for this work. That voucher is a carbon copy of the bill that we sent out. The item of March 24, 1915, 14th Avenue paving \$560 and the item of the same date \$743.04 represents the Federal Construction Company's bill for paving 14th Avenue. [234] There is no payment on that bill. It was just a bill. In the ledger under the caption, Examinations, is an item marked 'February 11, 1915, 14th & B., \$8.' That would show that some part of the work on 14th & B. Sts. was completed before that date. The ledger also shows a payment to E. C. Moran on account of paving contract, 14th Avenue of \$350 on January 16, 1915."

The entries showing the payments to the Federal Construction Company of the items of \$560 and \$743.04 show that the paving contract was com-

(Testimony of Fillmore Buckman.)

pleted at least as early as March 24, 1915, on 14th Avenue.

With reference to those items appearing on page 3 of the credit side of Mr. Rauer's original account, I remember one time in checking some of those items, as being collections of sums which were assets of the Sunset Construction Co. as of date prior to February 19, 1915, but at the time I was checking them, it was only from memory, that was as I could remember, whether they belonged to that statement or not. The only ones that I checked out were those that I was pretty certain of at the time that those belonged in there. That first item, July 6th, Reeder & Foster, \$407.20—I checked off that first item, I think as being an item which was an asset of the Sunset Construction Co. prior to the date of this bankruptcy. And that is true about the item under date of January 15, 1916, order of Bosworth, \$500.

I have been over this statement, and am familiar with the items there, and the items designated by the name of Federal Construction Company and Dowling. I would know where my ledger account is, showing the dates on which these items were collected, if they come in at the time I was keeping the books, I would have something in the ledger there. I would not say that these items collected from Dowling and the Federal Construction Company were not applicable in time prior to the [235] bankruptcy, on February 19, 1915, because we were dealing with Dowling and the Federal Construction

(Testimony of Fillmore Buckman.)

Company even after I had left the company, I know. We were dealing with them continuously.

Mr. Williams here offered in evidence that portion of a petition for leave to foreclose chattel mortgage entitled in the above-entitled court in the matter of A. E. Buckman, Bankrupt, and sworn to by J. J. Rauer on the 13th day of November, 1916, which reads as follows:

“Petitioner, J. J. Rauer, represents that on the 9th day of March, 1911, he loaned to the Sunset Construction Company the sum of \$500 and thereafter loaned various sums of money at different times aggregating upon the 15th day of March, 1915, the sum of \$105,615.84 upon which there has been paid back to petitioner J. J. Rauer, the sum of \$76,641.02, leaving a balance due of \$28,874.82; that all of this sum is secured by chattel mortgage hereinabove mentioned.

Said petition further avers that the chattel mortgage referred to was executed June 16, 1914.”

(Applicant has not made a part of this statement the various checks and books and documents introduced in evidence as vouchers for or in question of the account of J. J. Rauer for the reason applicant does not question in his exceptions the deductions made by the Master on account of interest and discount and on account of one duplication of an item; but appellant has necessarily confined this statement or bill of exceptions to those matters that relate to the exceptions specified by him.)

(Testimony of Fillmore Buckman.)

(Neither has there been incorporated in this bill of exceptions or statement the exceptions made and filed to the report of the Master, and which were subsequently passed upon [236] by the Master, as the exceptions not allowed by the Master were subsequently incorporated in the exceptions to the Master's report which were presented to the District Court upon objection to confirmation of said report and which form a portion of the record on appeal.)

Testimony of J. J. Rauer, for Defendants (Recalled).

J. J. RAUER, recalled: "In getting up the petitions which I verified and which were filed in this action, I think I gave my books to you, Mr. Anthony, and you added and subtracted and reached a lump sum. I think my checks were in evidence in this court at the time and that I did not have them on hand. I never stated in my affidavit that on the 15th day of March, 1915, I had an account stated with Mr. Buckman. I know what an account stated is.

“Exhibit 1, introduced in evidence, being Statement of Account of J. J. Rauer with Sunset Construction Company, reads in part, as follows:

Exhibit No. 1.

CREDITS, GENERAL ACCOUNT.

1915

July	6	Reeder & Foster	407.20
		McNeil	10.
	9	F. J. Gallagher	200.00
	14	F. J. Gallagher	190.
	14	F. J. Gallagher	267.50

Settle-
ment

31	J. E. Phillips 27 & K	600.
31	Rolandi	2.25

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1915

Sept.	31	English	14.15
“		Robbin	18.30
“		G. Mateo	1.50
“		A. Frank	2.25
		T. Veralda	1.25
	5	Vogt & Foster	1,227.50
	6	L. G. Roberts	34.29
	7	E. Chun, check	1.65
	9	Reece, old claim T. St.	150.
“		Dowling	200.
	12	Geissler	81.25
		J. P. Holland	208.15
	19	T. Dowling	600.

Sept. 22	Tucker	95.
Oct. 4	Reeder & Vogt	13.25
1	Jack Dowling	50.
"	Scrap Iron	75.
28	Rear Teaming	5.50
"	Foster & Vogt	91.48
Nov. 6	Jack Dowling	125.
20	Federal Construction Co.	150.
Dec. 6	Foster & Vogt	55.12
	Federal Const. Co. ..	80.
	Federal Const. Co. ..	174.
	Wood for Cement ..	78.74
	Warren, San Anselmo	5.
	McGuffugan	11.50
	D. F. Cramer	136.37
	Dr. O. M. Jones	100.
	Federal Construction	250.
30	Blanchard & Brown..	32.
31	E. K. Wood	29.39
Nov. 30	Dowling	200.
1916		
Jan. 15	Order of Bosworth ..	500.
17	Fay Improvement Co.	183.40
21	Fay Improvement Co.	26.75
22	Federal Const. Co. ..	300.
27	Blacksmith	5.
Feb. 1	Teaming	73.
"	Harris	60.
"	Telephone	7.50
"	Water	10.
"	Rent	25.
8	Blacksmith	5.

Aprl.	5	Dowling	250.
	"	Dr. Joy (Dowling) ..	317.12
	10	Harris	60.
		Telephone	7.50
		Water	9.80
		Rent	25.
		Hutton job	29.
May	3	Cramer machine	169.50
		Harris	60.
		Water	10.
		Rent	25.
		Telephone	7.50
		W. Nunes	7.
		Hauser	6.

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1916

May	5	Walsh	7.50
		Alischer	5.
	23	J. W. Wright (Dowling)	178.75
	10	Hutton Sand Machine	212.50
		Hutton Sand Machine	212.50
		Harris	60.
		Rent	25.
		Telephone	7.50
		Water	10.
		Watchman	7.50
	27	Hutton Sand Machine	152.

	30	Water	10.
		Telephone	8.90
		Watchman	7.50
		Harris	60.
June	30	Rent	25.
	"	Cramer Blacksmith..	96.80
July	20	Burns	18.
		Fordeso	1.25
		Farcello	7.25
	29	Hilton	5.
	"	Souza	24.
Aug.	1	Harris	60.
	"	Rent	25.
	"	Telephone	8.90
	"	Water	10.
	"	Blacksmith	82.25
	14	Sand Machine Hut- ton	350.
Oct.	20	Morgan Imp. Co. ...	76.82
Nov.	16	Morgan Imp. Co.	82.31
1915			
Oct.	28	Lipman	62.50
Nov.	6	J. W. Wright	125.
		Hirschler	50.
		Board of Trade (Gra- ding)	193.22
		J. W. Wright	95.
		D. E. Perry	22.50
		Mrs. Griffith	5.
	24	Gadisk	20.
		M. Newman	30.

1916

Feb.	2	Clark job	45.90	
	10	Teaming & Grading..	10.	
May	22	Ducas	55.65	
	"	Thompson, Hauling Dirt	32.50	
July	3	Ducas	50.	
Aug.	12	J. Dowling	8,409.80	

1915

Dec.	3	H. A. Moore	100.	
Feb.	11	City & County Hos- pital	250.	
Mch.	9	Harroway	10.	
Dec.	4	Neil Thomas	39.	
		Heyman City Imp. Co.	370.	
		Iverson	500.	
Mch.	25	Heyman & Co. (22 & L. lots)	4,000.	

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Apr.	10	Joseph Estate	1,100.	
		O. Heyman	48.72	
Dec.	7	15 lots @ \$1000, 15,000. Sub. to Mort- gage	9,000. 6,000.	

Credits

HITTELL CONTRACT, 22d Ave. bet.
H. & I.

1915

July	19	a/c	1,318.11	
	"	a/c	4,140.34	5,521.45

Credits

ACADEMY OF SCIENCE
CONTRACT.

1915

Aug. 31 a/c 225.

Oct. 1 75.

1916

Jan. 18 200. 500.

Credits

14th Ave. bet. A. B. and
C. Sts., Contract.

1915

Weinstein Bros. 137.50

Cora Rive 267.21

W. B. Ryder 306.70

Cora Rive. 55.

J. H. Babbitt 300.91

O. Heyman & Bro. ... 750.

J. F. Corkery 50.

J. Maloney 250.

1916

Jan. 6 Chas. Katz 100.

E. E. Jordan 83.65

Chas. Lathrop 145.

J. H. Babbitt 65.60

1915

July 6 J. Turey 30.25

W. F. Gardenus 160.

C. R. Russell 195.

Sept. 16 Anna Solari 148.81

Heyman 250.

	Dufour	20.	
	H. Meyer	1,398.04	
	S. Meyer	1,750.	
	Getz	521.83	
July 26	Dufour	10.	
Aug. 22	Dufour	10.	
1916			
Jan. 3	S. Meyer	487.60	
26	Katz, Bal.	67.50	
6	Getz & Son	500.	
HYMAN JOB, 14th & B.			
1915			
Nov. 6	a/c	300.	
13		300.	
23		200.	
Dec. 24		400.	
31		200.	
1916			
Jan. 8		200.	
[240]			
1916			
Jan. 14		500.	
15		1,200.	11,340.
.			

Proceeds of sale of Chattel Mort-
gage now in hands of Referee,

\$ 3,706. "

Testimony of Oscar Heyman.

OSCAR HEYMAN, testified in substance, as follows:

We entered into a contract with the Sunset Construction Company on outside Lands Block 297, 14th Ave. between Anza and Balboa called Grading Account No. 2. On Nov. 6, 1915, we paid the Sunset Construction Company \$300; on Nov. 13, 1915, \$300; on Nov. 24, 1915, \$200.00; Dec. 23, 1915, \$400.00; Dec. 31, 1915, \$225; On January 8, 1916, \$200.00; on January 12th, we paid J. J. Rauer \$500.00 on instructions from Buckman or Sunset; February 29, 1916, we paid the Sunset Construction Company \$1,200 by way of a lot located in Outside Lands Block 409—that is Cabrillo and 34th Avenue. This lot was taken by the Sunset Construction Co. in part payment for the work done on 14th Avenue—the deed was made to W. H. Chapman at the request of the Sunset Construction Co. We made this deed under proper instructions, because we would not put ourselves liable to Mr. Rauer or to Mr. Buckman without it.

As far as I remember there were assignments from Buckman to Rauer in various cases, and I know he always appeared in many of the transactions.

The \$500 payment to Rauer on January 12, 1916, was made by virtue of an assignment to him from the Sunset and was on the same account as the \$1,200 lot. At the time that lot was deeded to

(Testimony of Oscar Heyman.)

Chapman I knew that Rauer held an assignment of this account.

On May 21st, I paid \$750 and on May 24th, I paid \$250.00 to Rauer and the Sunset Construction. In addition to that we paid for curbing—that did not enter into this contract. Those payments were on the 14th Avenue contract. Then on June 8, 1915, I paid Rauer and Sunset \$500. The payments in May and June, 1915, were on account of the 14th Ave. contract.

There was another contract with Moran, and a contract [241] with a man by the name of Graham for some curbing. On the same contract for grading there, for the corner, we paid April 23, 1915, Sunset Construction Co. \$250.00; April 28th, \$200.00; and April 30th, \$200.00. They were simply charged to the Sunset Construction Company and applied to the corner 100 x 102, 14th Ave. and Balboa.

Now he did some work for us on Outside Land Block 406, on 26th Ave., between Fulton and Cabrillo. He graded 22d Ave. for us from Lincoln Way to Irving Street. We settled with him on March 31, 1916, and the job was commenced easily a year before that. We conveyed two lots to Mr. Rauer at an agreed valuation of \$4,000 in payment.

The amounts I have read out as being paid for work on 14th Ave. are for the grading work, the paving is not entered in this account. The paving contracts were entered into with the City Street Improvement Co. and the Federal Construction

(Testimony of Oscar Heyman.)

Co. The items I have here are simply grading accounts which we entered into with the Sunset.

The MASTER.—It is perfectly clear that it is all grading. He so stated in his testimony this morning.

The WITNESS.—It is all grading.

Q. Now, on this sheet marked "Street Work," you will notice an item May 21, and another item May 24, to J. J. Rauer. A. Yes.

Q. One item \$750 and the other \$250. Now, those items were paid to Mr. Rauer? A. Yes.

Q. On those dates?

A. Yes; that is our check register.

Q. They have no reference to this grading work, have they? A. No.

Q. That was for some other work?

A. We entered into a contract for paving and sewerage and curbing of 14th Avenue; that is represented here in this. [242]

Q. That would be this separate sheet here?

A. Yes.

Q. So that you would change your testimony of this morning in that respect? A. Yes.

The MASTER.—This separate sheet here means nothing in the record.

Mr. ANTHONY.—I am referring here by "this separate sheet," to the sheet taken from the ledger account of Mr. Heyman pertaining to Outside Land Block 297 and marked "Street Work Account," and there is a reference on this in writing, Moran and Sunset Construction Company.

(Testimony of Oscar Heyman.)

A. Yes.

Q. That would refer to a separate contract, would it?

A. Moran had the original contract for that work.

The receipt in evidence which is dated June 8, 1915, for \$500, is signed by J. J. Rauer. It is signed A. E. Buckman per J. J. Rauer. Mr. Rauer used to come in for money independent of Buckman and when he came in for money he had to receipt for it. Probably he signed for it when he received it. When he came in for money Buckman did not sign for him. The statements I show you are true transcripts of our ledger pages and contain a true statement of the moneys paid by us and the accounts upon which it was paid. Thereupon four ledger sheets were admitted in evidence, one of which is in the words and figures following:

“NAME: O. L. 297. St. Work a/c.

DOCUMENT: Moran & Sunset Const. Co. Charges.
1915

May 21	To J. J. Rauer & Sunset.....	750.
24	“ “	250.
June 1	Edw. C. Moran sewer.....	100.
8	J. J. Rauer & Sunset.....	500.
15	Edw. C. Moran.....	130.
July 30	H. Graham & Sunset.....	200.
Aug. 21	H. Graham acct.....	100.
Sept. 30	“ in full	200.
Oct. 4	“	179.03

[243]

(Testimony of Oscar Heyman.)

The ledger sheets entitled 'O. L. Grading acct. #2 "and" O. L. 297 Grading a/c Sunset, Corner 100 x102' refer to the grading of the lots and not the grading of the street.

There was a payment made to Edward C. Moran on account of Sewer \$100.00, June 18th, and an item to J. J. Rauer and Sunset \$500.00, and an item of \$200.00 to Graham for curbing on July 30. All this was in 1915.

We originally had a contract with Moran for paving and sewerage. He had nothing to do with the grading at all. The contract was at 22d and Lincoln Way. The ledger sheet marked "O. L. 297, St. Work," embodied grading of street, sewerage, bituminizing and curbing. That was the street on 14th Avenue. Moran did the paving and sewerage, not the grading.

I have one original bill that I have located, and it says: "Oscar Heyman & Bro. to Sunset Construction Co., April 28, 1915, to grading your property fronting 100 feet on B. St. and 102 ft. on 14th Avenue, as per contract dated April 19, 1915, \$953.00." Then there was due \$100.00, and there was a balance of \$853.00. Then he received \$250.00, and shows on it "credit by cash May 1, 1915, and May 8th." That includes the grading of lot.

The sheet O. L. 297, Street Work Account, includes the paving. The contract was with the Sunset Construction as far as our direct dealings went. Moran was the sewer contractor. Graham laid the granite curb. The items of Rauer and Sunset in-

(Testimony of Oscar Heyman.)

clude the paving and the grading of the street. My account states "14th Avenue and B. Grading," dated April 23, 1915.

I have another one from Graham on account of Sunset Construction Co. and J. J. Rauer assignment of money owing on street work, 14th Avenue and Anza—that is H. Graham. I have also on account of Sunset Construction Co. and J. J. Rauer, assignment of money owing on street work, 14th Avenue between Balboa [244] and Anza, dated August 21, 1915—payment of \$200.00 on account of grading lot 14th Avenue, Nov. 1915. November again, grading lot 14th Ave. on account of 14th Ave. grading, signed J. J. Rauer.

The only moneys which I paid to Rauer were under assignments made to him by the Sunset Construction Co. Our ledger sheet entitled O. L. 406 shows that we paid the Sunset Construction Co. \$300 on Jan 6, 1915, and \$200.00 on Jan. 23, 1915. I have a receipt where which shows that this money was paid for work done on 14th Ave. After I was notified of the assignments to Rauer I made no payments without knowing that Rauer was in a position to control the collection of the money if he desired to do so.

J. J. Rauer's journal introduced in evidence shows the following entries with reference to 14th Avenue collections:

	Charge for Curbing and Paving	Amt. Received by Mr. Rauer or others	Balance Collected and retained by Sunset	Excess over payment Bills Collected by Rauer
Webb	\$166.25	\$137.50	28.75	
Ryder	319.20	306.70	12.50	
Reva	322.21	322.21		
Babbitt	366.51	366.51		
Maloney	319.20	250.00	69.20	
Katz	207.80	167.50	40.30	
Jordan	157.50	83.65	73.85	
Lathrop	198.75	145.00	53.75	
Gardius	215.93	160.00	55.93	
Solari	198.75	148.81	49.94	
Getz & Son....	1,043.36	1,043.35		
M. Baker	210.00)	(1,179.00	Graham	
Hyman.....	1,969.00)	(1,000.00	Rauer	
Dufour	40.00	40.00		
Henry Meyer).				
S. Meyer	2,328.52	3,148.04		819.52
C. R. Russell...	196.00	195.00	1.00	
Tarpey	336.00	30.25	305.75	
Corking	198.75	30.00	168.75	
	<hr/>	<hr/>	<hr/>	<hr/>
	8,793.73	8,763.53	859.72	
	7,853.53		819.52	
	<hr/>		<hr/>	

Loss to Mr.

Rauer \$40.20 \$40.20

The Sunset Construction Company's books further show the [245] following entries:

“Feb. 24, 1915, Received from J. J. Rauer,
check\$245.
Discount on note..... 5.

\$250.

Assigned to J. J. Rauer note Ryder on 14th
Avenue\$250. ”

Said books, being entries made in the ‘Black
Book’ show the following:

Mar. 10, 1915, Rec. from City a/c 14 & B.....	495.	
Cash paid over to J. J. Rauer.		
Mar. 12, 1915, Pd. J. J. Rauer City bill 14 & B cash.	495.	
" " Ck, Scott, P. P. I. E. Co.....	535.	
Morrigan Coll. cash	35	1065.
Taken up in exchange.		
Ck. 5720	510.	
" 8386	200.	
" 7936	155.	
Pd. Hall Electric in full.....	102.94	
Int. Ck. 5720.....	90.90	
" 	24.	
Rider note.....	10.	
Int. on.....	3.	
Ck. J. J. Rauer.....	75.	1170.84
Diff.		105.84

Apr. 16, 1915.

Pd. J. J. Rauer Ck. Golden Gate
Park, on Clay.....

1290.

May 22, 1915.

Paid J. J. Rauer, Ck. Sol. Getz a/c
14th Ave.....

1043.36

May 25, 1915, Pd. J. J. Rauer Ck. B. Dufau..... 20.

“ “ “ “ Ryder..... 306.70

“ “ “ “ Meyer..... 3148.04

3474.74

S. C. Co. Ck. taken up 6245..... 1000.

6190..... 1000.

8256..... 330.50

5759..... 500.

Int. 563.80

3394.30

 80.44

June 3, 1915, Pd. J. J. Rauer, Ck. Rec. Sol Getz		
a/c 14th Ave.	521.38	
" " E. E. Jordan.....	83.75	
" " Gardese	160.00	
Due from J. J. R. on 2/25/15.....	33.34	798.47
<hr/>		
Ck. S. C. Co. taken up		
8260.....		
8357.....	800.	800.
<hr/>		
		1.53

There was admitted in evidence certified copies of resolutions passed by the Board of Public Works of the city and County of San Francisco, showing that the work of the Sunset Construction Co. for grading public streets was accepted as follows:

14th Avenue, C. to F. Streets Accepted	May 13, 1914.
14th Ave. C. to B. " "	May 13, 1914.
14th Ave. A. to B. " "	Jan. 22, 1915.
14th Ave. Crossing B. Street " "	Feb. 19, 1915.

Defendant Rauer's check stub #8631 introduced in evidence shows that this check was dated February 27, 1915, and made to [247] Sunset Construction Company and paid it on that date.

That cash book of Sunset Construction Company, pages 30 and 31, entries for July, 1915, shows the following items:

On debit side of cash book entry showing cash receipt by Sunset Construction Co. as follows:

Foster & Vogt (another name for Reeder

& Foster), in full for Jan. team hire.. \$907.20

On credit side of cash book, entry showing payments by Sunset Construction Co. as follows:

Stock hire, D. F. Cramer, a/c Foster &

Vogt order..... 500.00

Sunset Const. Co.

J. J. Rauer from Heyman..... 95.00

J. J. Rauer from Heyman..... 370.00

J. J. Rauer from Foster & Vogt..... 407.20

[248]

**Testimony of Fillmore Buckman, for Plaintiff
(Recalled).**

FILLMORE BUCKMAN, recalled, testified, in substance, as follows:

The Sunset Construction Company and D. F. Cramer, on account of team hire, got a sum, and on January 11, 1915, this was settled by Mr. Rauer taking over the account and paying it in the sum of \$2248.50. Mr. Rauer has never repaid that sum. Mr. Rauer carried us for that. The little black book of the Sunset Construction Company introduced in evidence contains a correct statement of the facts in every instance. The entries were made from my personal knowledge at the time they occurred.

The first pay-roll on the Carolan job that Mr. Rauer was interested in was a pay-roll that we did not have sufficient money to pay off with and for the money from Mr. Rauer for each man so much on account of his time during that month. Then, later on, we paid off the balance of that pay-roll, and the following month, Mr. Rauer's check—that was the first pay-roll where Mr. Rauer drew his own personal check for each man. But the one prior to that he gave a lump sum to cover the amount that we paid.

In reference to the entry May 14, 1915, Sol Getz & Son check for \$1,043.36 on the Hittell contract, I have gone over the cards from the 19th of February, 1915, up to the time the job was completed. The stock hire account will amount to

(Testimony of Fillmore Buckman.)

\$8,000 or \$9,000. Mr. Rauer was paying the hire account bills.

I have taken the foreman's report and made up the number of horses that were used, and taken it at the rate of \$1.50 in order to find out what must have been the cost of the stock on this job. I have also got the vouchers on that to prove that there was \$8,000 for stable expenses for stock hire, horse shoes and that kind of stuff. [249]

Those vouchers cover payments beginning from June up to December, 1915—that was five months—of course, there are other jobs that come in.

The 28th Ave. contract, between I. and J., Mr. Rauer had the assignment prior to the date of the bankruptcy; in fact, we were signing the contract up at the time, but the work was done after that. It belonged in there. The first work that was done on this job was July 12, 1915.

The McNutt contract was dated along in 1912 and was assigned to Mr. Rauer. I do not know just the date of the assignment. The contracts are not filed until the permit is granted by the Board of Public Works, and the parties to the contract cannot go upon the public streets and commence to do the work until that permit is granted.

As to the Academy of Science contract. The payroll starts on July 1, 1915, and ends on the 21st. It was a short job. There are the original cards. These checks are mixed up with the H. and J. job and 22d and Lincoln Way. These are the original time cards.

(Testimony of Fillmore Buckman.)

Q. I will ask you if there is not a \$200 credit in the original account showing that the total amount received on the Academy of Sciences contract was \$500 instead of \$300, as you make it appear in this amended statement.

A. On page 8 on January, 1916, there is a credit of \$200, but that had nothing to do with the contract at all, so they told me. I know nothing about it; it had no bearing on it at all.

The date of the permit, 28th Avenue, Irving and Judah Streets, was granted on May 5th, 1915, that was the date of the first permit.

Payment for getting these signatures to these contracts is made whenever the signature is obtained. On this particular job, there are two signatures that we could not get; in fact, I could not get them. Mr. Joe McHugh went out and got the two signatures, and Mr. Rauer paid him. [250]

I am familiar with the Academy of Science contract. The Sunset Construction Company had a contract with the Academy of Sciences for doing certain work around the Museum out there, and that was completed with the exception of certain back-filling that was to be done after the building was completed. When the time came to complete the contract it cost a great deal more to complete it than the balance retained by the Academy of Sciences. Later on, we had to go back and do that work. Then there was a balance, I believe it was \$300 odd, due the Sunset Construction Company on the contract. After that there was some work done for

(Testimony of Fillmore Buckman.)

the Academy of Sciences, but it was day work; it was not contract work; it was hauling around the building there, it was so much a load. In the general statement there are two items, Academy of Sciences balance of \$300, and then there is this other amount for \$200. In looking that up, I find that was for hauling that was done there by the day.

On the ledger here, the item, July 21st, 1915, \$352, is for work done by the day; they were hauling material in and around the building. The balance on the contract is \$300 and some odd dollars. The cards that Mr. Clark has were the vouchers to sustain this \$352 item which was day work, July 21, 1915. The cards show that. These cards were for that \$352 item, which represents the day work done on that job. I cannot say, right offhand whether it is correct or not.

This money was received by Mr. Rauer, according to his statement, and was a balance on this contract work which was done before the day work was commenced. There is no question about that.

[251]

Testimony of J. McCoy.

J. McCOY testified in substance as follows:

I have been working for the Sunset Construction Co. continuously for 28 years and up to March, 1919, and my occupation was manager of teaming, grading and construction work, and for 10 years I was Buckman's superintendent of machinery and equipment. The equipment consisted, principally,

(Testimony of J. McCoy.)

of scrapers, plows, sand machines, cars and tracks. On the T. Street job they used from 2 or 3 scrapers, up to 8 or 10 at different times, 5 or 6 blocks of track—these blocks were 240 feet to the block, about 25 cars and one sand machine. This equipment was used during the whole time the job was in progress. The rental value was 25 cents a day for the scrapers and 25 cents a day for the cars. The sand machine was a conveyer with an endless chain on it used for loading cars. The T. street job started before any wiring was done by the Pacific Gas & Electric Co.

A man named Hutton used two trains of about six cars each per day; and also a sand machine and track. This same equipment was used on the job on 28th Avenue between J. and K. Streets—also on the same avenue—29th Avenue between I. and J. Streets; also on the Richmond side, 28th Avenue between J. and K. Streets. There were about 18 cars in regular use, and some extra for emergencies; there was also used one sand machine and about two blocks of track.

On the Hittell job, 22d and Lincoln Way, there were 21 cars in actual use and three or four extra cars, the sand machine and quite a string of track there. This work was done along Lincoln Way, down along Golden Gate Park from 22d to 36th—about 14 blocks, 3000 feet, and about a mile of track was used.

None of this equipment was scrapped or sold during the time [252] that he was foreman. The sand machine was hired by McHugh, for which he

(Testimony of J. McCoy.)

paid a rental of \$150.00 a month. The Morgan Improvement Company had a few cars—three or four cars, and a couple of hundred feet of track.

In the equipment altogether, there were four sand machines, 60 cars, about a mile of track, 7 or 8 scrapers.

One sand machine was used on the Fernando Nelson job, about 25 cars and about a mile of track.

It appears from the books and accounts introduced in evidence that the jobs and their duration on which J. J. Rauer used any of the equipment mortgaged to him by the Sunset Construction Company were the following:

T. Street job—April 11, 1916, to July 24, 1916, 3½ months.

Testimony of Thomas W. Simmie.

THOMAS W. SIMMIE in substance testified as follows:

That he had been employed in looking after the Sunset Construction Company jobs, and some time actually as foreman; that the Sunset Construction Company owned three sand machines, and Buckman owned one; there were about 60 iron Koppel cars, and quite a number of wooden cars, and a little more than a mile of track. This equipment is the very equipment that was made the subject of the sale in bankruptcy.

The wooden cars and some track were not used on a job on San Buno Avenue being conducted by the Federal Construction Co. There were no streets

(Testimony of Thomas W. Simmie.)

near it at that time—the nearest street [253] was Oakdale Avenue. It was used on the West side of Oakdale Avenue—they worked on both sides of Oakdale Avenue.

My experience as to rental value of this equipment is—that I was in conjunction with the rental of a machine on Fulton Street. Mr. Buckman rented one to a man that fell down on it, and he took it over himself, and I ran that machine with Mr. Buckman afterwards, and I know that Mr. Buckman was getting \$150.00 for the rental of these sand machines. I personally had charge of the machines on different occasions and personally rented some of the machines. The rental value of the machines was \$150 a month. On the Nelson Track Koppel cars were being rented for \$5.00 a month a car, and 3 cents a foot for the track by Buckman's concern. I was then in Buckman's employ and knew what the Koppel cars were rented for also the track. I have here the verified claim of J. J. Rauer, against the Buckman Estate and that claim shows that the wiring done by the Pacific Gas & Electric Company, on the T. Street job was done on March 20, 1916, and that the certificate of completion shows that the job was completed on December 13, 1916.

I saw some of this equipment in use on the two jobs on 28th Avenue, one between J. and K. Sts., and the other between I. and J. Streets, and I saw some of this equipment in use on the Hittell job, 22d and Lincoln Way a great many times. McHugh only

(Testimony of S. P. Doyle.)

took the shovel alone, or the same machine alone—no track or equipment. He paid \$150.00 a month rental.

It was thereupon admitted by counsel for J. J. Rauer that the amounts shown by J. J. Rauer's account in evidence to have been collected from 'Hutton' were paid for use of the equipment referred to in the above testimony." [254]

Testimony of S. P. Doyle.

S. P. DOYLE, Cashier of the Federal Construction Company, testified in substance as follows:

I have been cashier of the Federal Construction Co. for 10 years and was in that position when a job was done by that Company on San Bruno Ave. near Oakdale Ave. The Federal Construction Co. made certain payments to J. J. Rauer after that job was completed. I have here duplicate checks issued to Rauer and Buckman or Rauer and Sunset Construction Co. Some of the checks were paid to the Sunset Construction Co.; some to J. J. Rauer as assignee of the Sunset Construction Co. and A. E. Buckman; and some were paid on orders given on us by those persons. The payments all got into one account, that is paying bills for rental of wagons, and rail, cars, and in settlement of his *pro rata* share of the job on Balboa St., 21st Ave., and this San Bruno job. The statement shows that we paid the following amounts which are listed on our ledger sheet:

1915.

Nov. 20 Cash to S. C. Co..... 150.

30 Cash to S. C. Co..... 200.

Dec. 9 Cash to Harvey Graham,
order S. C. Co..... 254.

22 Cash to S. C. Co..... 250.

31 Rent for cars, Carolina
St. 210.

1916.

Jan. 22 Cash to S. C. Co..... 300..

Apr. 8 Cash to S. C. Co. & J. J.
Rauer 250.19 Bill assigned to S. C. Co.
Joy's 21st Ave..... 317.1214 Cash to J. F. Dowling &
Co. 275.02Note: Amt. to be charged
to S. S. Co., J. J. Rauer

May 4 Cash to S. C. Co..... 100.

23 Acct. against H. M. An-
thony, Foerster St. as-
signed to them..... 125.0823 Acct. against Joseph Est.,
21st Ave.....1305.52

18 Cash to A. E. Buckman.. 60..

Aug. 12 Cash in full to J. J. Rauer
of all accts.....7139.62

Sept. 12 Cash to A. E. Buckman.. 10.

29 *Pro rata* share collecting
Bannock Ass..... 10.29 Amt. collected by Rauer
from Seashore Realty.. 544.50

1916.

Sept. 29	<i>Pro rata</i> share loss 21st Ave., 40%	227.81
29	<i>Pro rata</i> share profit B. Street, 40%	491.60
29	Allowance Joseph Est. orig. chg. \$1305.52, collected \$1100 diff.....	205.5
29	<i>Pro rata</i> share profit San Bruno, 50%	9858.1

[255]

Sept. 29	Order given to A. Young & Buckman & chg. Buckman account.....	205.20
29	Team hire etc. 20th & Wisconsin, San Bruno, 14th, 19th, Irving St., Forest Hill, 21st & B., 15th Ave.....	5190.5
29	Allowance made to Buckman	188.6
29	Allowance made to Buckman	91.4
29	Allowance made to settle: Total Allow.....	1396.66
	Prev. Ent.....	203.07
		1193.5

1917.

Apr. 14	Cash J. J. Rauer.....	292.05
30	Jos. Dillon acct. assigned to S. C. Co. & J. J. Rauer	287.75
30	Diff. on acct.....	20.88

(Testimony of S. P. Doyle.)

The check of Aug. 12 for \$7,139.62 covered payment in full to date for team hire, rental of cars and all other charges, and for the *pro rata* share of the profits accruing from the following contracts: San Bruno Ave., 21st Avenue and Balboa or "B" Street. I was present at the negotiations that preceded the payment of that check and knew that some money had been held up by Mr. Rauer on a notice to withhold. This was money due the Federal Construction Co. from the city of San Francisco. The check for \$7139.62 was paid by us to J. J. Rauer coincident with the release of that notice to withhold. At that time there was a conversation at which there was present Messrs. Anthony, Buckman, Rauer, Dowling, Hanrahan and myself. Mr. Hanrahan is secretary of the Federal Construction Co., and Mr. Dowling is president. At that conversation there was a general summary made of the account and it was closed. I have a copy of that summary which is taken from the ledger sheets of the Federal Construction Co. That was used as a basis of our settlement. These are our original book entries. The ledger sheets and the journal entries. Thereupon the ledger sheets and journal sheets were received in evidence. The ledger sheet contained all the data heretofore read into evidence by the witness, and in addition thereto, the following: [256]

1915.

Apr. 24 Improving 14th Ave. as
per contract.....5760.

24 Improving Lot on Irving
St. 258.38

1915.

Apr. 30	Paid for examination 14th Ave.	48.	
May 24	Improving 14th Ave. crossing per contract...	783.04	
31	Misc. pay-roll expense....	6.10	
June 30	Misc. pay-roll expense....	2.10	
June 30	Misc. pay-roll expense....	5.10	
July 14	Inspection fees 14th Ave. contract	6.	
		<hr/>	
		6875.82	
12	by cash (Paid by J. J. Rauer)		2000.
June 7	To 4 bbls. Cement (for sewer C. St.).....	10.20	
July 31	Misc. pay-roll expense...	4.35	
31	Misc. pay-roll expense....	.90	
Oct. 1	100 brick taken by Buckman	1.40	
23	Rent 3 wagons @ \$15 per mo.	146.30	
25	Black powder to McCoy..	26.70	
26	Sharpening drill points..	.40	
Nov. 20	Purchase from Dunham, Carrigan & Hayden ...	3.82	
1916			
June 9	Sharpening drill points 20th & Carolina	24.80	
July 29	Ass. J. W. Wright & Co. Balboa St. Collect. by J. J. Rauer.....	180.	
		<hr/>	
		7274.69	

Journal entries on Sheets admitted
in evidence.

Sept. 29, 1916.

Sunset Construction

Co. 544.50

Accts. Payable 544.50

Accts. receivable 544.50

Seashore Realty

Co. 544.50

This amt. collected by
J. J. Rauer. He is en-
titled to same for reason
that like amt. of money
was held out when we
made settlement with him
in full on Aug. 12, 1916.
This is a part of the \$1,-
145.18 the total amt. held
out of this payment.

Contracts San Fran-

cisco 9858.11

As per agreement Sun.

Const. Co. shares $\frac{1}{2}$ of
profit on San Bruno job.

Suspense Acct. 5190.45

Items noted below are
charge of S. C. Co. for
team hire. These items
have previously been
charged through pay-roll
acct. but checks held until
such time as we could
make settlement with

these people. As said
above amts. chgd. to con-
tracts; we are therefor
chg'g cks. deposited in
favor of S. C. Co.

20th & Wisconsin.. 811.15

San Bruno Ave....1044.05

14th Ave. 12.50

19th Ave. 622.10

[257]

Irving St. 24.

Forest Hill 32.

21st Ave. & B St. ..2069.65

15th Ave. 568.

Suspense Acct. 188.60

Items noted below allowed

S. C. Co. when settlement
made of their acct.

Inspection fee 14th

Ave. 30.

Inspection fee Fin-

negan 85.60

Line & Grd Nelson 35.

All. Irving St. con-

tract 40.

Contracts San Fran-

cisco 91.40

Items noted below allowed

S. C. Co. when settlement
was made.

Hauling cars & track to

(Testimony of S. P. Doyle.)

Wisconsin St.	72.
Helpers two way...	12.
Rope, powder & caps	7.40
Contracts San Fran-	
cisco	1193.59

Balance due S. C. Co. previous to settlement was 7103.34. When settling this acct. J. A. Dowling allowed him an add. 1396.66 to make a total credits amounting to \$8500. We cannot show this add. credit on our books as part of it has already been entered but which was questioned (210) when getting ready to make final settlement. This amt. of 1396.66 also contain chg. of 210, which has already been credited. We also allowed them 6.93 for extra team which added to 1396.66 after deducting 210 leaves the above amt. See papers on file.

I am familiar with the arrangements that were made between the Federal Construction Co. and Buckman about the division of the profits on the San Bruno job. The understanding at and before the contract was awarded to us was, if we got the contract, Buckman was to be on the job every day and have full charge and see that it was run properly and was to supply all equipment, and the Federal Construction Co. was to supply all the money. The profits were to be divided 50-50. The Federal was to bid on the job and finance it and Buckman was to furnish the equipment and superintendence, and profits were to be divided equally. The profits on that job came to \$19,716.22. That is double the amount [258] shown in the ledger of \$9858.11. On the 21st Ave. and Balboa St. job we had an

(Testimony of S. P. Doyle.)

arrangement for the division of the profits whereby we got 60% and Buckman got 40%. We were to finance the jobs and furnish materials. He was to furnish equipment and superintendence. On the 21st Ave. job there was a loss and he stood \$227.81, and on the B. Street job his share of the profits was \$491.60. On the San Bruno job we actually paid Buckman 50% of the net profits realized. Where I have spoken in my testimony of checks being made to J. J. Rauer as assignee of the Sunset Construction Co. and A. E. Buckman, I mean that Rauer was the sole payee of the check. Rauer was the assignee of the Sunset Construction Co. and we added Buckman as another payee with Rauer simply as a protection so as to have his signature on the check.

We made the payment of April 14, 1917, in final settlement. We had assigned some accounts to Buckman and Rauer to collect, and they failed to collect them, so they turned them back to us and we gave them our check for the difference. It was only a couple of hundred dollars. The exact description given by the Board of Public Works to the San Bruno Ave. job was 'Improvement of San Bruno Ave. from a line 835 feet northerly from Courtland Ave. to the easterly intersection of Sengen St.' "

Thereupon there were admitted in evidence the resolutions of the Board of Public Works showing the temporary acceptance of said work on January 19, 1916, and a resolution of final acceptance on May 29, 1916. Also the resolution of the Board

(Testimony of S. P. Doyle.)

awarding that contract to the Federal Construction Co. on December 21, 1914.

“The agreement for sharing profits on the job I have mentioned was merely a verbal agreement. There were some teams used on the job but they were charged to the job. They didn’t [259] figure in the settlement. We rented teams from Cramer on some of these jobs. I do not recall any transaction whereby Cramer’s bills were assigned to Rauer and paid by us to Rauer. Mr. Rauer was intimately connected with Buckman during all that time.”

Mr. Dowling personally had a claim against Mr. Rauer for the use of a lot for storing certain things on it, or some rental, at \$20 a month. It had nothing to do with the Federal Construction Company.

I am familiar with the arrangements that were made between the Federal Construction Company and Mr. Buckman, or the Sunset Construction Company, about the division of profits on the San Bruno job. The understanding was at the time the contract was awarded to us, or before, if we got the contract, that Mr. Buckman was to have full charge of the job and be on the job every day, to see that it was run properly and to supply all equipment. The Federal Construction Company was to supply all money, and the division of profit was to be made 50-50. The Federal Construction Company was to bid on the job and finance it, and Mr. Buckman

(Testimony of S. P. Doyle.)

was to furnish the equipment and superintendence, and they were to divide the profits equally. The net profits on that job came to \$19,716.22.

That is double the amount that is shown in this ledger, \$9,858.11.

On the 21st and B Street job we also had an arrangement for the division of profits.

On the 21st Avenue and Balboa Street job we were to receive 60 per cent profit and Mr. Buckman 40 per cent of the profits. We were to finance the job and furnish the materials on those two jobs. He was to superintend the job and furnish the equipment. On the 21st Avenue job there was a loss; he stood \$227.81 of the loss, and on the Balboa Street job his share [260] of the profits was \$491.60. The full profit on that particular job would be twice \$491.60. It was 40-60.

That would be different in reference to the San Bruno job, on the settlement by virtue of the compromise. We paid him half, fifty per cent.

Where I have spoken of checks being made to J. J. Rauer, assignee for Sunset Construction Company and A. E. Buckman, that means that Rauer was the sole payee of the check. We had dealings with the Sunset Construction Company, a corporation.

As to these other two jobs on Balboa and Twenty-first Avenue, I don't know whether it was the Sunset Construction Company or A. E. Buckman; A. E. Buckman was the party that was to share in the profits. We had Buckman's signature on

(Testimony of S. P. Doyle.)

the endorsement of the check. Mr. Rauer was the assignee of the Sunset Construction Company, and we joined Buckman as another payee and got his signature as a payee on our check, simply as a protection.

The Federal Construction Company did not enter into a contract with either Buckman or the Sunset Construction Company; that is, an agreement as to the sharing of the profits on the job. For instance, the Federal Construction Company and A. E. Buckman should agree and contract to do that certain work out there, we to furnish the money and he to do the work and supply the equipment, and having papers written up to that effect. No such papers were ever written up as to the profits of the job, or anything put down; it was merely a verbal agreement. When I say there was no contract, I mean there was nothing made in writing. Mr. Buckman was to do the superintendence of the job. There was an oral agreement made, but nothing was reduced to writing on the subject. And Mr. Buckman was to furnish the equipment. And, in consideration of the fact that he would furnish all the equipment to be used and superintend the job, [261] they were talking about going into a division of the profits. It was agreed before the job was started, as to the profits.

The work on the San Bruno job—conditional acceptance, it is called here,—on January 19, 1916, practically stopped at the date of the conditional

(Testimony of S. P. Doyle.)

acceptance. There was no real work done thereafter.

The final acceptance was merely held up pending certain adjustments.

The resolution of the Board of Public Works awarding the contract which shows the date of the completion of the contract to be May 29th, 1916, and date of awarding of contract to be December 21, 1914, was received in evidence.

During the performance of the contract a question arose as to Mr. Buckman's performing the agreement on his part. Our superintendent reported a number of times that Buckman was not on the job and when we complained about it to Mr. Buckman, he said, "I have other work to do." Then he promised to show up every morning, but our superintendent reported that he did not do so, and we were very much dissatisfied with the way he carried out his part of the contract. [262]

Testimony of Thos. F. Boyle.

THOS. F. BOYLE, Auditor of the city and county of San Francisco, testified as follows:

I have brought here certain papers which are in my custody as Auditor of the city and county of San Francisco. The first is a notice to withhold on the letter-head of H. M. Anthony, dated June 13, 1916, addressed to me and signed by J. J. Rauer. It is endorsed "Released 8-12-16." I also have another paper on the letter-head of H. M. Anthony, dated Aug. 12, 1916, signed by J. J.

(Testimony of Thos. F. Boyle.)

Rauer and addressed to me. Both papers were filed by me. There is also a third paper dated June 13, 1916, signed by J. J. Rauer and endorsed "Released 8-12-16." Thereupon the papers were offered and admitted in evidence. The first reads as follows:

"The undersigned, J. J. Rauer, hereby makes demand upon you that you retain out of any moneys coming from the City and County of San Francisco to the Federal Construction Co. the sum of \$12,000 due on that certain contract which said Federal Construction Co. has for the grading and sewerage of San Bruno Ave. between Oakdale Ave. and Galvin St. entered into with the Board of Public Works of said City and County of San Francisco. The claim for \$12,000 is for the hiring, rental, use and consumption of equipment and material used in the grading and sewerage of San Bruno Ave. between Oakdale Ave. and Galvin St. by the Federal Construction Co. from the Sunset Construction Co. and said Sunset Construction Co. has sold, assigned and transferred all of its claims and demand for said sum of \$12,000 against said Federal Construction Co. to the undersigned, J. J. Rauer, and the undersigned is now the owner and holder of said claim and demand.

(Signed) J. J. RAUER."

The second document reads:

“The undersigned hereby makes demand upon you that you retain out of any moneys coming from the City and County of San Francisco to the Federal Construction Co. the sum of \$1,900 out of any demands or money due the Federal Construction Co. through the department of Public Works. The claim of \$1900 is for the renting of teams and doing of grading work by the Sunset Construction Co. to the Federal Construction Co. on that certain job for the grading and sewerage of San Bruno Ave. between Oakdale Ave. and Galvin St. The said Sunset Construction Co. has sold, assigned and transferred to the undersigned J. J. Rauer, all of its claim and demand for the aforesaid hiring of teams and grading and the undersigned is now the owner and holder of said claim and demand.

(Signed) J. J. RAUER.” [263]

Both the foregoing documents are addressed to the Auditor of the city and county of San Francisco, dated June 13, 1916, and endorsed “Released 8-12-16.”

The third document is a written release of the foregoing two documents, dated August 12, 1916, and signed by J. J. Rauer. The authenticity of the signature of J. J. Rauer to each of the foregoing documents is admitted by his counsel.

Testimony of J. A. Dowling.

J. A. DOWLING, President of the Federal Construction Company, testified in substance as follows:

In the year 1914-15 we had a grading job on San Bruno Avenue. We are strictly in the paving business. This grading job came up. We presumed that Mr. Buckman from his past experience knew a great deal about the grading business, so we called him in and talked to him about the job. We were to go in the job together. He was to supply the equipment and his personal supervision, and we were to supply the money and bid the job out in our name, and we bid the job out and got it. We had a verbal agreement with A. E. Buckman that we broke 50-50 if any money was to be made; if any money was to be lost, we were to stand it.

At the time of the settlement of the work, the controversy that had arisen between us and A. E. Buckman was that A. E. Buckman never supplied any material or any equipment, and very little of his services, and we did not figure that he was entitled to participate in any profits that might be made on the job.

There had been written agreements to be signed; he presented them to us to sign, but we did not sign them. After we had signed up on the work we made absolutely no written agreement of any interest to A. E. Buckman. We made a settlement with [264] J. J. Rauer. Mr. Rauer brought in an assignment by Buckman of any interest he

(Testimony of J. A. Dowling.)

might have in the work; Rauer and Buckman were both present at the time of the settlement.

The controversy between Mr. Buckman and ourselves was that we didn't figure that Mr. Buckman was entitled to any share of the profits, and we came to an adjustment and paid, I think it was \$7,000, or something in that neighborhood, to settle the matter up—to Mr. Rauer.

It was not 50 per cent. We charged everything against it that we thought proper to charge against it, and then that was kind of an upset settlement; it was not any certain percentage of the job at all. The considerations that were taken into account in arriving at this settlement with Mr. Buckman were that Mr. Buckman had gone out there many times, and—Mr. Buckman presented himself every morning on the job and tried to hold his claim down. When we started the job originally, he started to do a little work around there, and we assumed he knew what he was doing. We found that very shortly afterwards he did not, and we put our own superintendent out on the job ourselves to run the work, a man who was supervising the rest of our work in San Francisco; but Buckman, to hold his claim down, I guess, presented himself every morning on the job, and I suppose to give some color to his claim; we didn't want any lawsuits or any bother about the matter, and we came to a settlement and paid the money to Mr. Rauer on Mr. Buckman's assignment.

(Testimony of J. A. Dowling.)

The Journal entry, dated September 29, 1916, is made on a second item of an allowance, and it says:

“Under orders from J. A. Dowling an additional \$1,396 was allowed Mr. Buckman in order to make up the amount which he claimed and which was in excess of the amount the Federal allowed on their books.” [265]

The City Engineer, in making the estimate—it was at the crossing of San Bruno and Crescent Avenues, it was a sink, soft ground; when he filled that in, the sink went down and we had to put in more dirt than the cross-section showed, and we had an extra claim before the City Engineer for the extra dirt, which was afterwards allowed, after that adjustment had been made, and we allowed him a portion of that. That is where the additional amount comes in.

We released the money to pay Rauer on the San Bruno job settlement when Rauer released the stay notice which he had filed with the Auditor. The ledger and journal entries of the Federal Construction Company contain a correct statement of the accounts between our company and Rauer and the Sunset. The entry in the journal *re* credit of \$1,193.59 was a credit allowed an outgrowth of the original San Bruno Avenue contract on an extra which we got doing work in the sink.

We also had an agreement on the 21st Avenue job with Mr. Buckman and he was to share 40% of either the profits or the losses. And our books

(Testimony of J. A Dowling.)

show that in that case that his *pro rata* of loss was \$227.81, with which you charged him.

And on B Street we also had an agreement on that job, in which he was to take 50 per cent of the profits or the losses. And in that case our books show that we gave him credit for \$491.50, his *pro rata* of the profits.

In calculating those things we calculated them in accordance with the terms of the original agreement. The agreement with Buckman was a separate and distinct agreement. On the 21st Avenue and on the B Street work, we absolutely had nothing to do with it at all, he attended to the entire work himself; we merely paid his pay-roll for him. The agreement provided we should get 60 per cent of the profits or of the losses for financing the job; [266] we absolutely had nothing to do with the job at all. He supplied the equipment and did all the work.

On the San Bruno Avenue job we did not follow out the original agreement, because he did not follow out his original agreement. He represented to us that he had a lot of cars and track and equipment, and he had the equipment to do the job with, and when he came to the job he had no equipment at all. He did eventually put a few cars on the job, very few. Yes, and a very short amount of track; we had to get a steam shovel and put it in there; we bought it from Crocker & Howe, who had the Twin Peaks Tunnel job.

(Testimony of J. A. Dowling.)

And the \$1,198 we gave him credit for, we gave him credit because we were obligated to do so under the original agreement. We felt we were kind of obligated in a way; he presented himself every morning, and we figured that if he sued us that probably after a lot of bother we would have to pay, and we paid him to get rid of it. We did so because of the original contract that we entered into with him, and for no other reason; because Buckman did not live up to his contract anywhere along the line. We paid him to avoid trouble; that is the only reason. His claim was founded on the original agreement he had with us to divide the profits 50-50; and payment was made because of that agreement, and in consequence of that agreement; that was the basis for it. There were other considerations, such as adjustments with the City Engineer's office on the main job. They made up an estimate of the amount of work that had been done, but in that estimate they did not allow for the extra material we put in for the sink that had sunk down; that is where the extra amount comes in afterwards. He figured with some adjustment with the Crocker people on the Twin Peaks material. That was a part of the consideration for his services in making an advantageous settlement. [267]

Testimony of Mr. Rauer, for Defendants (Recalled).

Mr. RAUER, recalled, testified as follows:

I received the \$7,139.62 entered on my ledger as a credit to the Sunset Construction Co. following July 3, 1916, and described as "Dowling" from the Federal Construction Co. The credit of \$125 is a sewer bill which Anthony owed to the Sunset, and I simply paid his bill and deducted the amount from what I owed him for attorney's fees. The item of credit for \$1145.18 marked "Unpaid Assessment 21, 22 & B," is for bills which were assigned to me by the Federal Construction Co. and I went out and collected them.

I received from Hutton as rent on a sand machine, \$200 on August 15, 1916; \$400 from September 1st to October 1st; \$400 from October 1st to November 1st; \$300 from November 1st to December 1st; and then after 1917, there are some other items. Altogether I received from Hutton \$1300, for rent during the period mentioned. My account shows the following receipts for the use of this equipment in 1916, to wit:

May 10, Cramer Machine Acct.....	189.60
“ Hutton, Sand Machine...	212.50
“ Hutton, Sand Machine...	212.50
“ 27, Hutton Sand Machine....	152.
Aug. 14 Hutton Sand Machine....	350.
Oct. 20 Morgan Improv. Co.....	76.82
Nov. 16 “ “ “	82.31

I got the public contract on the T Street job. Mr. Buckman wanted to do the job, and we entered

(Testimony of Mr. Rauer.)

into a written contract, where he was to do the work. I was to furnish everything, and I was to get 1% on the investment, and I lost \$945. That job was late in July, 1915. If I testified at the original hearing that Buckman had nothing whatever to do with the T Street job I was in error.

I took possession of the equipment and personal property of the Sunset Construction Company under my mortgage before [268] the time the decree was rendered in the Superior Court action of *Wherle vs. Buckman, et al.* and I let it out to Mr. Hutton and others, and used it in connection with the Federal Construction Company jobs, and on all other jobs that had been assigned to me by the Federal Construction Company ever since I started to pay all the bills of the Sunset Construction Company on March 20, 1915. I will explain about this machine. I have a patent on that machine that nobody can use it, and I was to get so much money out of it, and I let them use it right along—all of these patents I have a patent on now, and nobody can use that machine without they pay for it; in consequence, when this money came in and I took that money and told Mr. Buckman I got that money and it would go to reduce the money that I spent in fixing these machines up and putting them in repair and building them. I collected that money as rental for this machine and I delivered possession of it to Mr. Hutton before I collected the rent. I had possession of this parti-

(Testimony of Mr. Rauer.)

cular machine at the time I was collecting rent for it. I had let it out, because I had a patent on it.

I had the same patent on the other three sand machines. I claim a patent covering three of the sand machines; one machine, I have forgotten the name, they tried to build, and infringed on the machine, and they were afraid to go on with it, and they sold out to Mr. Buckman, and Mr. Buckman took that machine over and used it, where they talked of this morning, about Mr. Dowling—I had nothing more to do with it than you had; he took it over there and used it just the same, and I never saw a cent of it.

I have a patent on the working of the machine; the machine that they built only cost \$300 or \$400 or at the utmost \$500. I did not let out all of these sand machines. McCoy used it, and if you will look on this page you have here you will see I never got a cent out of it, not a nickel. I will show you [269] if you want to look at it. Here are all of McCoy's machines, he took the money, and when I got wind of it, I took his promissory note for \$925—I took his note for all of these items that I have here; you will find it all in this statement.

The rental value of these sand machines and the balance of this equipment was just what you could get; Mr. McCoy claimed \$150 per month. I put up \$75, I think—here is this McCoy machine, they had no chains or anything, and I took the money out of my own pocket and put it up, so that

(Testimony of Mr. Rauer.)

they could get it in working order. The privilege of using the machine was worth \$150 a month, or more, if you could get it, not the rent of the machine.

I remember testifying in the case of myself vs. Fernando Nelson that the amount of the equipment that he had for use there was of the reasonable rental value of \$745 a month; I was talking of the patent and everything else. That was one sand machine, 25 cars, and a mile of track. That was in 1918. While Mr. Buckman was there, up to the time of the sale of the machine, I never got a cent, not one nickel, I think for seven or eight months.

I remained nominally the contractor on the T Street job from the time of its commencement until the time of its completion. The work was done on it in my name clear through the whole progress of the work; if you will refer to the T Street matter, I went and bought \$690 worth of wire there. Officially and according to the public records, I was the contractor with the Board of Public Works on the T Street job from the time of its commencement to the time of its completion. And the only contract I had with Buckman was a private contract between him and me. The equipment belonging to the Sunset Construction Co. was, in fact, used on that T Street job.

On the Hittel job at 22d and Lincoln Way I lost \$945.

I did not receive any money for the use of this equipment. You can see the items; I have got

(Testimony of Mr. Rauer.)

two items, don't you [270] see, down here, made out by Fillmore Buckman, and it says here there is a loss of \$945.

I testified in the Fernando Nelson case that I had an agreement with Buckman made after I bought this equipment at the sale in the bankruptcy court, by which I gave him an option to repurchase this machinery and all the rents received for it were to be credited. I remember in the Superior Court case to secure possession of this equipment that judgment was rendered the day after the action was filed, by stipulation. I agreed to give credit to Buckman for \$7,500, for the equipment in the Superior Court case, but at the sale in bankruptcy I bid in the property for \$3,750.

I gave Buckman credit for money received on the San Bruno Avenue job on the general running account.

I filed an account in the matter of the Buckman estate. The fact of Buckman's bankruptcy did not interrupt our business dealings at all. I continued on doing business with him the same as before. I was advancing him money on other jobs he was running outside of the San Bruno job. The amount of equipment on the San Bruno job consisted of two blocks, half a double track, and about 12 cars, two trains. I supplied teams on the San Bruno job through Mr. Cramer. The teams were supplied to the Federal Construction Company. I supplied the horses that went down about May 1st, 1915. The trustee in bankruptcy never interfered with the running of that equipment.

(Testimony of Mr. Rauer.)

The equipment was also used on the job at 43d Avenue—that is where Mr. Dowling had it—and then on a job of Eaton & Smith somewhere, I think they got from Heyman, and I lent them \$500.00 and I got \$460.00 back, and the lot that went in there to Mr. Chapman; I had nothing to do with it—never got a dollar. Then he had a government job over in the Spring Valley works somewhere.

Mr. Williams admitted that the trustee in bankruptcy never [271] disturbed Mr. Rauer in the use of the equipment.

This is a statement of account commencing in March 20, 1915, up to the date of Buckman's death. It includes items pertaining to the fixing of the sand machines. I advanced the money to keep them running. The understanding was that Buckman was to make these advancements but he didn't do it and so I had to. During that period I lost between \$16,000 and \$18,000 on my transactions with Buckman. I am familiar with the grading of 14th Avenue between A and B Streets. It was finished in January, 1915, and the grading between B and C Streets was finished in January, 1914, and on 14th Avenue between C and F Streets in May, 1914. That work was done a year and seven months before his bankruptcy. I could not estimate what I paid out for repairing the sand machines. The money mentioned in the account of the Federal Construction Co. being the first item dated April 24, 1915, for \$5760 was money paid to them for paving 14th Avenue.

(Testimony of Mr. Rauer.)

The bill for the Ajax Foundry, dated August 16, 1916, \$100 was for wheels for the sand machine and cars; the \$120 December 1, 1915, Enterprise Electric Company was to fix up the motor in the sand machine. As to the check dated January 27, 1918, payable to the order of A. E. Buckman for \$261 he wanted to get some money—I have got it down for \$250, but I find that the check is \$261. I gave him that money to buy materials for the sand machines and cars, etc. on the Nelson job.

I paid the bills I have here amounting to \$651.21 for repairing the sand machines. I paid the Pacific Gas & Electric Co. \$479, and received \$249 back, on the T Street job, so as to get the power to work the sand machine.

The MASTER.—This bill shows that \$499.40 was charged for [272] putting in the wire on the job at 40th Avenue and T Street. It provides: "Special main wire extension, subject to credit and refund as follows: 20% of monthly bills paid for current on the main line extension will be credited to your account monthly until the total amount of \$259.40 has been refunded. Salvage on wire, etc. \$240." It seems from this the whole amount was paid in and the whole amount was paid back. The contract is perfectly plain, Mr. Anthony. Apparently the idea is that the entire capital cost will be paid by the person using it, in the first place, but it will all come back to him. [273]

J. J. RAUER further testified that he had rented a block of land at \$25 per month from Feb. 15, 1915,

(Testimony of J. J. Rauer.)

to December, 1916, which block was used for the storing of the equipment and all auxiliaries, and from which it was moved to the various jobs and to which it was returned from such jobs.

J, J. RAUER also testified that the sand machine patent had been owned by A. Everett Hall and C. C. Higgins prior to August 15, 1916, and that he had rented the use of this patent in the City and County of San Francisco from them at \$100 a month from April 1915, to the time he purchased it from them on August 15, 1916, and that since then he has been the owner of it.

Plaintiff then introduced in evidence the following memorandum, and J. J. Rauer stated that it was an agreement between him and A. E. Buckman and that he had signed it, viz.:

“KNOW ALL MEN BY THESE PRESENTS: That I, J. J. Rauer hereby agree to make and execute to A. E. Buckman, an assignment and transfer of certain patent rights for the City and County of San Francisco, State of California, for sand moving machines, as set forth in the assignments made by A. Everett Ball and C. C. Higgins and A. E. Buckman, and also to make a bill of sale for three machines, wire, etc., under said patents, upon said Buckman paying to said Rauer the sum of \$2500, and interest thereon at the rate of one per cent per month, interest payable monthly.

It is understood that any money received for the use of said machines under said patent shall be credited and applied upon said sum of \$2500 and interest.

That any machines used by said Buckman on his contracts said Buckman shall pay to said Rauer the sum of \$200 per month while so using them, and all machines used by any other person, or persons on other work, the money received therefor shall be paid to said Rauer.

The payment of \$1500 of said \$2500 shall be credited on the debt of the Sunset Company.

This agreement and option shall be good for one year from date hereof, provided all agreements set forth above are complied with.

WITNESS my hand this 15th day of August,
A. D. 1916.

HATFIELD, Trustee,

vs.

BUCKMAN.

Pffs. Exh. H. M. Wright, Master.

J. J. RAUER.

[Endorsed]: Filed Dec. 12, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk." [274]

Entries in the "Voucher" or "Bill Book" kept by the Sunset Construction Co. to the following effect, were admitted in evidence:

"Henry Meyer 2232.

To SUNSET CONSTRUCTION
COMPANY, Dr.

1915

Jan. 22. For grading 14th Avenue bet.

A. and B. Sts. to the official
line and grade in front of
your property,

fronting 118 ft. @ \$5.50....649."

“Thos. A. Vogel, 2233.
1915 To SUNSET CONSTRUCTION
COMPANY, Dr.

Jan. 28. For grading 14th Ave. bet.
A. and B. Sts. to the official
line and grade in front of
your property,

fronting 24' 5" @ \$5.50.....137.50”

Also similar bills, under the same date, for grading
14th Avenue between A. and B. streets, @ \$5.50 per
front foot, were rendered to the following:

Bill Number	Name	Amount
2234	M. A. Webb	\$137.50
2235	John Mahoney	264.
2236	W. B. Ryder	264.
2237	Edw. H. Tarpey	264.
2238	M. Baker	165.
2239	Oscar Heyman	1419.
2251	Oscar Heyman	858.

“City and County of San Francisco 2241.

1915 To SUNSET CONSTRUCTION
COMPANY, Dr.,

Jan. 6.

For grading the crossing of 14th
Avenue & B. St. to a point 300 ft.
North in front of City property to
the official line and grade,.....\$495.”

Also a similar bill against the city and county of
San Francisco for the sum of \$495 for grading to a
point 300' south of said crossing.

“Sol. Getz & Sons, 2285.

To SUNSET CONSTRUCTION
COMPANY, Dr.,

1914

May 12. To grading 14th Avenue bet.
B. and F. Sts. to the official
[275] line and grade in front
of your property,

fronting 287 ft. @ \$3.50\$1004.50

“Academy of Science, G. G. Park, 1967.

To SUNSET CONSTRUCTION
COMPANY, Dr.,

To labor from Jan. 30 to

Feb. 12, 1914198.40

To materials 20.25

Plus 10%19.84 238.49”

“Academy of Science, G. G. Park, 1972.

To SUNSET CONSTRUCTION
COMPANY, Dr.,

To extra excavating & breaking

up and taking out old con-

crete piers, including powder,

fuse & labor,535.

Plus 10% 53.50 588.50

**Testimony of Fillmore Buckman, for Defendants
(Recalled).**

FILLMORE BUCKMAN testified that he made the entries in the voucher or bill-book, and that this was no more than a carbon copy of bills which had

(Testimony of Fillmore Buckman.)

been sent out by the Sunset Construction Co. That he knew the bills were correct when he sent them out and that they were made out and dated after the work covered by them had been finished. That sometimes delays occurred which made it necessary for a considerable period of time to elapse between the completion of the work and the rendition of the bill, but that bills were never sent out before the work was completed. Thereupon there was read into evidence from the "Black Book" the following entry:

"Jun. 3, 1915. Paid J. J. Rauer		
	Ck. Sol. Getz a/c	
	14th Ave.	521.38
"	E. E. Jordan	83.75
"		160.
Due from J. J. R.		
	on 5/25/15	33.34 798.47"

We had a contract with the Academy of Sciences at Golden Gate Park which was finished before bankruptcy. After [276] bankruptcy we did some extra work there but the extra work was done for a percentage over costs. The ledger of the Sunset Construction Company shows that J. J. Rauer collected \$300 as a balance upon the original contract. That had nothing to do with the extra work.

The cash-book of the Sunset Construction Co. was introduced in evidence and showed the following cash transactions occurring between J. J. Rauer and the Company between the dates of February 19, 1915 and March 16, 1915.

"1915.

Feb.	24.	Paid, J. J. Rauer to D. F. Cramer for stock hire in advance	\$200.
		Received J. J. Rauer C. B. Ass. Ryder note 14 Ave.	\$245.
March	1.	Received J. J. Rauer, loan,	30.
	2.	Received J. J. Rauer, loan,	200.
	3.	Paid J. J. Rauer,	355.
	5.	Received, J. J. Rauer	125.
	8.	Received J. J. Rauer,	300.
	12.	Received J. J. Rauer	75.
	12.	Paid 2 City Warrants,	495.
	8	Paid J. J. Rauer, to D. F. Cramer for stock hire	704.96
	8.	Paid J. J. Rauer	300.
	12.	Paid J. J. Rauer, Ck. of Scott,	535.
	12.	Paid R. Monigan col- lection	35.
	12.	Paid City Warrant	495.
	15.	Received J. J. Rauer,	175.
		Interest on \$20,000.	400.
		Loan	175.
		Difference Ex. of Cks.	69.50

Thereupon the matter was submitted to the Master in Chancery, and, on June 16, 1921, the Master made and filed his tentative report, which tentative report is contained in the record on this appeal; and thereupon both the plaintiff and the defendant J. J. Rauer filed exceptions to said report, and hearings upon said exceptions were duly had by the Master on August 27, 1921, and the same was further briefed by counsel. At said hearings plaintiff was represented by Messrs. Edwin H. Williams and Charles S. Wheeler, Jr., and defendant J. J. Rauer was represented by Messrs. H. M. Anthony and Grant & Zimdars; and after the hearings of said exceptions and objections the said Master made and filed his supplemental report herein on the 12th day of December, 1921; which said supplemental report is set forth in the record on appeal herein; and that thereafter defendant J. J. Rauer filed in the above-entitled court his objections to the Master's reports and to the confirmation thereof by the above-entitled court, and the hearing of said objections was duly had before the above-entitled court, Honorable Wm. C. Van Fleet, presiding, on the 2d day of August, 1922; whereupon the Court made and entered its order herein on the 30th day of September, 1922, overruling said objections and exceptions to the said reports of the Master, and confirming the same, and thereupon filed its final decree herein on Nov. 6, 1922, and which said order and final decree are contained in the record on appeal herein. [278]

The foregoing is proposed by defendant, J. J. Rauer, as the corrected statement of the case on appeal of said J. J. Rauer from said interlocutory decree and the said reports of the Master of Chancery, and from the final decree entered by the said District Court in and for the Northern District of California, Second Division, disallowing and overruling his exceptions to said reports of the Master in Chancery, and confirming said reports, and directing said J. J. Rauer to pay certain moneys to the Trustee in Bankruptcy.

This proposed statement includes those exceptions and amendments suggested by plaintiff to the proposed statement as originally presented which have been agreed upon between the parties as proper to be inserted in the statement; and also those others of said amendments and exceptions which were allowed at the hearing before Honorable William C. Van Fleet, Judge of said Court, on Friday, August 17th, 1923; and also has reduced to narrative form all the portions of the testimony which were included in the first proposed statement.

Dated August 21st, 1923.

H. M. ANTHONY,
GRANT & ZIMDARS,

Solicitors for Defendant and Appellant, J. J. Rauer.

Receipt of copy of the foregoing proposed statement received this 21st day of August, 1923.

CHAS. S. WHEELER, Jr.,
EDWIN H. WILLIAMS,

Solicitors for George J. Hatfield etc., Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt Respondent in said Appeal. [279]

The foregoing proposed statement embodies all the amendments heretofore proposed by plaintiff and allowed by the Court, and all amendments subsequently proposed by plaintiff.

Dated August 28th, 1923.

CHARLES S. WHEELER, Jr.

E. H. WILLIAMS,

Solicitors and Attorneys for Plaintiff. [280]

The foregoing is hereby settled and allowed as the statement on appeal of the defendant, J. J. Rauer from the order or decree made herein on the 11th day of September, 1922, including the order directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this court, and from the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, pursuant to the order of September 11, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified.

Dated August 28th, 1923.

(Sgd.) WM. C. VAN FLEET,

Judge of said Court.

[Endorsed]: Filed Aug. 28, 1923. Walter B. Maling, Clerk, By J. A. Schaertzer, Deputy Clerk. [281]

(Title of Court and Cause.)

Petition for Appeal from Order Made and Filed in this Action on September 30, 1922, Allowing Compensation to the Master H. M. Wright, Esq., as Compensation for Services in Said Action and Directing that the Same be Paid by J. J. Rauer, Defendant Herein.

Now comes J. J. Rauer, one of the defendants in the above-entitled action and feeling himself aggrieved by that certain order made and entered in the above-entitled cause and court and filed with the clerk thereof on the 30th day of September, 1922, allowing and fixing the compensation of the Master H. M. Wright, Esq., at the sum of \$1800 as and for compensation for his services herein and directing that the same be paid by said defendant J. J. Rauer in the first instance within twenty days after notice of the order, and which order was so made by the Honorable Wm. C. Van Fleet, Judge of said Court, does hereby appeal from said order, and from the whole thereof, in so far as it allows and fixes compensation for said Master as aforesaid, and directs that the same be paid by said defendant Rauer, and does so appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in said defendant's assignment of errors, which is filed herewith, and defendant prays that this his appeal be allowed; and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers

upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, and your petitioner the said defendant Rauer being desirous of staying all proceedings under said order pending said appeal, and being desirous of giving and executing a supersedeas bond and giving such security as may be required to stay the enforcement of [282] said order as aforesaid, does further pray that the proper order be entered herein required to perfect said appeal and perfect and effect a stay of all proceedings, as aforesaid.

J. J. RAUER,

Defendant.

By H. M. ANTHONY and

GRANT & ZIMDARS,

Solicitors of Said Defendant.

[Endorsed]: Filed Oct. 14, 1922. W. B. Mal-
ling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[283]

(Title of Court and Cause.)

**Assignment of Errors on Appeal from Order Made
and Filed Herein on September 30, 1922,
Allowing \$1800 as Compensation to the
Master H. M. Wright, Esq., for Services
Rendered Herein.**

Now on this 14th day of October, 1922, comes the defendant J. J. Rauer by his solicitors, H. M. Anthony and Grant & Zimdars, and says that there

is manifest error on the face of the record in the above-entitled suit and that the order made and entered herein on the 30th day of September, 1922, allowing \$1800 compensation to the Master, H. M. Wright, Esq. is erroneous and unjust to this defendant, and said defendant hereby assigns the making and giving and entering of said order herein as error for the following reasons, and does not make and present the following assignment of errors upon which he will rely as follows, to wit:

EXCEPTION I.

The Court erred in finding and decreeing that said Master, H. M. Wright, Esq. was entitled to any compensation herein, the record showing that the said Master was acting judicially in the performance of the services for which the said sum of \$1800 was allowed as compensation as aforesaid, and the record showing that he was financially interested and would be financially affected by the judgment or report that he would make in the performance of the said services.

EXCEPTION II.

The Court erred in finding and decreeing that the said Master was qualified to perform the services for which compensation was allowed by said order, as aforesaid, and in not holding that the services were nugatory and of no value, and this because the Master as a judicial officer could not adjudge in a matter in which he would be affected financially [284] by the character of terms of the report he would make the Court.

EXCEPTION III.

The Court erred in finding and decreeing that the services of the said Master were of greater value than the sum of not to exceed \$750, and the Court erred in making an allowance to the Master of any sum in excess of \$750.

EXCEPTION IV.

The Court erred in finding and decreeing that the Master was entitled to any compensation, and this because it appears from the said record that the Master being disqualified to act judicially the services rendered were of no value, and of the fact as a matter of law, if not of fact, the Master had at all times during the performance of the services full knowledge.

WHEREFORE this defendant prays that the said order allowing compensation to the Master be reversed and set aside and that the defendant have such other and further relief as may seem meet and equitable.

H. M. ANTHONY and
GRANT and ZIMDARS,
Solicitors for Defendant J. J. Rauer.

[Endorsed]: Filed October 14, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[285]

(Title of Court and Cause.)

Order Allowing Appeal from Order Made and Filed Herein on September 30, 1922, Fixing Compensation of the Master H. M. Wright, Esq., and Directing the Payment of the Same by J. J. Rauer, and Fixing the Amount of a Supersedeas Bond and Bond for Costs on Appeal, and Staying Proceeding for the Enforcement of the Order from Which the Appeal is Taken.

This day the defendant J. J. Rauer, a defendant in the above-entitled action, appearing by his solicitors, Messrs. H. M. Anthony and Grant & Zimdars, and presented his petition for an appeal from that certain order made and filed herein on the 30th day of September, 1922, allowing the sum of \$1800 as compensation to the Master, H. M. Wright, Esq., and his assignment of errors accompanying the said petition, and by the said petition the said defendant having requested this Court to fix the amount of a supersedeas bond and also for costs and damages on appeal so to effect a stay of proceedings on the enforcement of the said order pending the Appeal, the said petition, upon due consideration is hereby allowed, and an Appeal from said order is hereby allowed to the United States Circuit Court of Appeals for the Ninth Circuit, upon the filing of a bond in the sum of Twenty-five Hundred Dollars, with a good and sufficient surety to be approved by the Court, the said bond

to operate as a supersedeas bond and for costs, and to fully stay all proceedings upon the order appealed from pending the appeal; and

IT IS FURTHER ORDERED that a complete transcript of all records, proceedings and papers upon which the said order appealed from was based, duly authenticated, be certified and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 14th day of October, 1922.

WM. C. VAN FLEET,
Judge of Said Court. [286]

[Endorsed]: Filed Oct. 14, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [287]

Bond on Appeal.

(The premium charged for this bond is twenty-five dollars per annum.)

KNOW ALL MEN BY THESE PRESENTS, That we, J. J. Rauer as principal and Fidelity and Deposit Company of Maryland, a Corporation created, organized and existing under and by virtue of the laws of the State of Maryland, as surety, are held and firmly bound unto H. M. Wright in the full and just sum of Twenty-five Hundred (\$2500) Dollars, to be paid to the said H. M. Wright, his certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 16th day of October in the year of our Lord One Thousand, Nine Hundred and Twenty-two.

WHEREAS, lately at a District Court of the United States for the Southern Division of the Northern District of California in a suit depending in said Court, between George H. Hatfield, as trustee of the estate of A. E. Buckman, a Bankrupt, plaintiff vs. A. E. Buckman, J. J. Rauer, et al., are defendants a judgment and order was rendered against the said J. J. Rauer directing him to pay H. M. Wright the sum of \$1800 and the said J. J. Rauer having obtained from said Court an order allowing an appeal to the United States Court of Appeals to reverse the said order in the aforesaid suit, and a citation directed to the said Wright and the other parties to said action citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said J. J. Rauer shall prosecute said appeal to effect, and answer all damages and costs if he fail to make [288] said appeal and plea good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

J. J. RAUER (Seal)

FIDELITY AND DEPOSIT CO., of Md. (Seal)

By F. E. Brisbane,
Attorney in Fact.

Paul M. Nippert (Seal)
Agent.

State of California,

City and County of San Francisco,—ss.

On the 16th day of October, A. D. 1922, before me John McCallan, a Notary Public in and for the city and county of San Francisco, residing therein duly commissioned and sworn, personally appeared F. E. Brisbane, Attorney in Fact, and Paul M. Nippert, Agent, of the Fidelity and Deposit Company, of Maryland, a corporation, known to me to be the persons who executed the within instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same, and also known to me to be persons whose names are subscribed to the within instrument as the Attorney in Fact and Agent respectively of said corporation, and they, and each of them, acknowledged to me that they subscribed the name of said Fidelity and Deposit Company of Maryland thereto as principal and their own names as Attorney in Fact and Agent respectively.

In Witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city

and county of San Francisco the day and year first above written.

[Seal]

JOHN McCALLAN,

Notary Public in and for the City and County of
San Francisco, State of California. [289]

Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Oct. 16, 1922. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [290]

(Title of Court and Cause.)

**Defendant Rauer's Praecept to Clerk to Prepare
Transcript on Appeal from Order Allowing
Compensation to H. M. Wright.**

To the Clerk of the above-entitled Court.

Sir:

You will please prepare transcript of record in the above-entitled cause to the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Judicial District, pursuant to the appeal heretofore allowed herein and directed to said court from the order made and filed in said action on September 30, 1922, allowing compensation to the Master, H. M. Wright, Esq., as compensation for services in said action, and directing that the same be paid by J. J. Rauer, one of the defendants herein, and from the decree allowing said compensation to said Master, H. M. Wright, Esq., and include in the

said transcript the following proceedings, pleadings and papers on file, to wit:

1. The complaint of bill in said action;
2. The answer of the defendants thereto;
3. Supplement to the bill, and answer.
4. The interlocutory decree therein;
5. The petition of the Master for compensation and statement of the services rendered by him in the preparation of the report for which compensation is asked.
6. Objections of defendant Rauer to the special Master's petition for compensation.
7. Order confirming the report of the Master.
8. Order and decree filed herein September 30, 1922, fixing the compensation.
9. Decree confirming Master's report and giving [291] judgment in favor of the plaintiff in said action against the defendants therein as in said decree specified.
10. Defendant Rauer's petition for appeal from order allowing the said compensation.
11. Defendant's assignment of error on appeal from said last-mentioned order.
12. Order allowing appeal from the said order and fixing bond on appeal and to stay proceedings.
13. Bond on appeal from said last-mentioned order on appeal.
14. Citation on appeal, admission and affidavit of service from the said last-mentioned order.
15. This *praecipe*.

Said transcript to be prepared as required by law, and the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and filed in the office of the Clerk of the United States Circuit Court of Appeals on or before the 15th day of November, 1922.

Dated, at San Francisco, November 9, 1922.

J. J. RAUER,

Defendant and Appellant Herein.

By H. M. ANTHONY and

GRANT & ZIMDARS,

His Solicitors.

Service of copy of the within praecipe admitted this 10th day of November, 1922.

CHARLES S. WHEELER and

CHARLES S. WHEELER, Jr.

E. H. WILLIAMS,

Attorneys for Plaintiff.

WM. H. CHAPMAN.

H. M. WRIGHT.

[Endorsed]: Filed Nov. 10, 1922. Walter B. Maling, Clerk. [292]

(Title of Court and Cause.)

Petition for Appeal from an Order or Decree Made Herein on the 11th Day of September, 1916, Directing an Accounting and Referring the Matter of the Accounting to H. M. Wright, Master in Chancery of this Court, and Also Allowing an Appeal from the Final Decree Made Herein on the 6th Day of November, 1922, Disallowing and Overruling the Objections Made by J. J. Rauer to the Account and Report Filed Herein by H. M. Wright, Master in Chancery, Pursuant to the Order of Sept. 11, 1916, and Confirming and Approving Said Report, and Decreeing that the Said J. J. Rauer, Defendant, Pay to the Plaintiff the Sums of Money in the Said Decree Specified.

Now comes the defendant, J. J. Rauer, one of the defendants in the above-entitled action, and feeling himself aggrieved by that certain order of decree made and entered on the 11th day of September, 1916, directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this Court, and by the whole of said order; also feeling himself aggrieved by that certain decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery to the order of September 11, 1916, and confirming and approving said report, and decreeing that

the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified, and by the whole of said judgment and decree, does hereby appeal from said orders and decrees and from the whole thereof, and does so appeal to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in said defendant's assignment of errors, which is filed herewith; and said defendant prays that his said appeal be allowed, and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco; and your petitioner, the said defendant J. J. Rauer, [293] being desirous of staying all proceedings under said orders and decrees pending the appeal therefrom, and being desirous of giving and executing a supersedeas bond, and giving such security as may be required to stay the enforcement of the said orders and decrees aforesaid, does further pray that the proper order be entered herein required to perfect the said appeal, and perfect and effect a stay of all proceedings, as aforesaid.

J. J. RAUER,
Defendant.

By H. M. ANTHONY and
GRANT & ZIMDARS,
WM. GRANT and J. B. ZIMDARS,
Solicitors for Said Deft.

[Endorsed]: Filed Nov. 18, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [294]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

IN EQUITY—No. 233.

GEORGE H. HATFIELD, Substituted for R. CORDS, JR., as Trustee of the Estate of A. E. BUCKMAN, Bankrupt,
Plaintiff,

vs.

A. E. BUCKMAN, et al.,

Defendant.

Assignment of Errors on Appeal from an Order or Decree Made Herein on the 11th day of September, 1916, Directing an Accounting and Referring the Matter of the Accounting to H. M. Wright, Master in Chancery of this Court, and Also Allowing an Appeal from the Final Decree Made Herein on the 6th day of November, 1922, Disallowing and Overruling the Objection Made by J. J. Rauer to the Account and Report Filed Herein by H. M. Wright, Master in Chancery, Pursuant to the Order of Sept. 11, 1916, and Confirming and Approving Said Report, and Decreeing

that the Said J. J. Rauer, Defendant, Pay to the Plaintiff the Sums of Money in the Decree Specified.

Now on this 13th day of November, 1922, comes the defendant J. J. Rauer, by his solicitors, H. M. Anthony and Grant & Zimdars, and says that there is manifest error on the face of the record in the above-entitled suit, and that the order made and entered herein on the 11th day of September, 1916, directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this court, and in the whole of said order, and that certain decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, to the order of September 11, 1916, and confirming and approving said report and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified, that the same are [295] and each of them is erroneous and unjust to this defendant; and the said defendant hereby assigns the making and giving and entering of the said order and decrees herein as error for the following reasons; and does so make and present the following assignment of errors upon which he relies as follows, to wit:

In order to make clear the following assignments of error addressed to the order made herein on the 11th day of September, 1916, the following statement is made.

It is the contention of defendant Rauer that the proper construction of the said order and decree of Sept. 11, 1916, is that the Court has found that Buckman is the owner, as alleged in the complaint, of all the capital stock of the Sunset Construction Company, a corporation, and that the transfer made by said Buckman to Rauer of the said shares of stock was made for the purpose of defrauding the creditors of Rauer, as alleged in the complaint in the action, and that the decree adjudges that said transfer of the said shares of stock was void as to the creditors of Buckman, and that Rauer account for all transactions with the corporation, and to have such accounting the matter is referred to the Master.

The plaintiff makes the following contention relative to the construction of the said decree, and which construction is adopted by the Master and is the basis of his report, and is the construction adopted by the Court and confirming the Master's report. The said construction so contended for by plaintiff is as follows: That the said decree determines that there was no such entity as the Sunset Construction Co., that the issues raised and determined by the decree was not in reference to the ownership of the shares of stock in any corporation, but there was a determination that there was no [296] corporation in existence and that Rauer should account to the trustee in bankruptcy, as if his transactions were directly with the bankrupt with full knowledge of the bankruptcy. In other words, the decree according to this contention

should be regarded as a determination that Rauer was a participant in a fraudulent scheme whereby under the cloak of the nominal corporation, Sunset Construction Company, Buckman and Rauer had transactions with each other for the purpose of defrauding the creditors of Buckman.

We will firstly assign errors based upon the construction contended for by the defendant Rauer as above stated, and will follow the assignment of errors based upon the construction contended for by the plaintiff and admitted by the Master in making his report.

EXCEPTION I.

Assuming that the construction contended for by the defendant Rauer is the proper construction of said decree of September 11, 1916, the said decree is erroneous for the following reasons:

The evidence shows that paragraph 1, of said interlocutory decree and order of Sept. 11, 1916, wherein it is decreed that Buckman was the owner of all the outstanding shares of the capital stock of Sunset Construction Co. from the time of its organization down to the 19th day of February, 1915, at which time it vested in his trustee in bankruptcy, is not sustained by the evidence, but on the contrary the evidence shows that on the 15th day of January, 1914, all the issued shares of stock of the said corporation, excepting qualifying shares to other persons who served as directors, were pledged to the defendant J. J. Rauer for the sum of \$20,000.00 at that date owing by [297] the corporation to the defendant Rauer, and to secure the payment of

which the said Buckman pledged the said shares of stock, and that pursuant to the said pledge and the failure to pay the indebtedness designed to be secured by said pledge, the said stock was sold under pledgee sale on August 12, 1914, and subsequently the ownership thereof passed to the defendant J. A. Meadows.

EXCEPTION II.

That said decree of September 11, 1916, is erroneous wherein it is held in Paragraph 2 that Buckman was at all times up to the 19th day of February, 1915, the owner of the Sunset Construction Co. and of all the property and books of said corporation that on said last-mentioned date vested in the Trustee in Bankruptcy of said Buckman, and that the said property is since held by said Trustee in Bankruptcy pending an accounting between said company and the defendants therein named, including Rauer, for the following reason:

That the evidence shows the state of facts hereinbefore stated under Exception I of this assignment of errors, and further the evidence shows that the Sunset Construction Company was a corporation duly organized and existing under the laws of the State of California, or if the same were not duly organized and existing under the laws of the State of California, the said corporation and all persons controlling the same, caused the said so-called corporation to function as a corporation, and it was at least a *de facto* corporation, and that it is not alleged in the pleadings that Rauer was in any sense cognizant of any defect in the organi-

zation of said corporation, but on the contrary the evidence shows that Rauer dealt with the corporation and with the persons controlling [298] the same in all respects as if it were a duly incorporated corporation and had no knowledge or notice of any kind that any such corporation had been formed for the purpose of defeating or defrauding the creditors of Buckman, but on the contrary the evidence shows that all the transactions of said Rauer with the so-called entity, Sunset Construction Co. were in good faith and in the full belief that he was authorized to transact business therewith, and that the said Rauer had nothing whatever to do with the formation of said corporation, and had no connection of any kind therewith and had no knowledge of any purpose on the part of the incorporators, if any such there were, to use said corporation to defraud creditors of Buckman, and he did not in any wise participate in any wrongful dealings with Buckman.

EXCEPTION III.

The said decree of September 11, 1916, is erroneous wherein it is decreed in Paragraph 3 that the said defendant J. J. Rauer account for all moneys received by him or advanced by him to the defendant Sunset Construction Co. since the 12th day of September, 1911, for the purpose of determining what claims, if any, existed between said Company and the said defendants in said action, for the following reason:

That the evidence shows the state of facts set forth in Exceptions I and II of this assignment of

errors, and therefore the Trustee in Bankruptcy as the assignee of A. E. Buckman has no interest in any such accounting as is ordered by the said paragraph of said decree.

EXCEPTION IV.

The decree is erroneous for the following reason: That the evidence shows that there was a valid pledge upon the [299] shares of stock to the defendant Rauer, and that if it be assumed that the pledgee sale did not legally divest Buckman of his ownership in the shares, the pledge itself and the indebtedness which it secured still existed, and the decree is erroneous in not providing for the protection and safeguarding of the pledged interest and indebtedness and having the same taken into account on the reference to the Master.

EXCEPTION V.

Defendant Rauer now assigns the said decree of Sept. 11, 1916, to be erroneous, and this assignment is based upon the construction of said decree contended for by the plaintiff and adopted by the Master and the Court, as hereinbefore set forth.

The decree is erroneous wherein by Paragraphs 1, 2 and 3, it decrees that Buckman was the owner of all of the capital stock of said corporation up to the time of its adjudication in bankruptcy on the 9th day of February, 1915, and decreeing that since that date the trustee in bankruptcy was the owner of said capital stock, and decreeing that Buckman was the owner of the corporation up to the date of its adjudication in bankruptcy, and as such the owner of all the property, books and records of the

corporation, and that from the date of his said adjudication in bankruptcy, his trustee in bankruptcy, is the owner of all the property of the said corporation.

No issue is tendered by the pleadings that Rauer participated in the organization of the corporation, Sunset Construction Co., or that he had any knowledge that the said corporation was not duly organized and possessed of capacity to transact business; and in this connection this defendant refers to Exceptions I, II and III in support of and as reasons supporting this fourth assignment of errors. [300]

EXCEPTION VII.

The decree is erroneous, and the defendant Rauer takes exception thereto for the following reason:

That the evidence shows that Rauer had no knowledge or notice that the corporation, Sunset Construction Co., was a cloak or cover to enable Buckman to defraud his creditors, if such were his purpose in forming the corporation, and that Rauer advanced the sum of money designed to be secured by the pledge of the shares of stock in good faith, as security for the sum of money evidenced by the pledge, and that if Buckman transacted business in the name of the corporation and other people transacted business with him in the belief that the corporation was the owner of the property, and that the corporation had an existence, Buckman could be estopped from making any claim to the contrary so far as those persons are concerned who transacted business with him upon

his aforesaid representation, and the evidence shows that Rauer was in this category, and the trustee in bankruptcy or Buckman would have no greater rights than the said Buckman to make claim that the corporation was not the owner of the property. A court of equity will look through a transaction and will give Rauer a lien by way of pledge on the property which was designed to be pledged, whether that property stands in the form of shares of stock in a corporation, or on other assets supposed to be represented by said shares, and the decree should protect Rauer in these advances so made and so designed to be secured by said pledge. [301]

The following assignments of errors are directed to the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, the Master in Chancery, to the order of September 11, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified.

EXCEPTION VIII.

The Master's said report, and the whole thereof, should be set aside and considered null and void, and the failure so to do is hereby assigned as error, and for the following reasons:

That it appears from the record in this case that the action is prosecuted by a trustee in bankruptcy, who is not personally liable for the payment of any

obligations beyond the extent of assets coming into his hands; that there are no assets of any kind belonging to the bankrupt estate, other than such as might result from the judgment in this case. That this fact was known and recognized by the Master in his petition to be allowed the sum of \$5,000.00 as compensation for his services in making the report. That in view of the fact that it appears by the record and by the statement of the Master himself in his petition for compensation herein, that only in the event of a judgment against the defendant Rauer, would he receive any compensation for his services, the record shows that he was financially affected by the character of the report he would file and by the judgment to be entered thereon, and therefore his report is void as being made by a judicial officer on a subject matter in which he had a financial interest, and the judgment and report filed herein being in favor of that interest. [302]

EXCEPTION IX.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant Rauer hereby assigns as error. The decree and the Master's report adopted and confirmed by the decree are erroneous in its recital that by the decree of September 11, 1916, it was adjudged and decreed that the defendant Buckman was at all times up to the 19th day of February, the owner of the Sunset Construction Co. and of the property and books of said company, and since said date, the trustee in bankruptcy of said estate is the owner thereof; and that the

defendants A. E. Buckman, J. J. Rauer, Fillmore Buckman and William H. Chapman severally account for all moneys received by them, or any of them from the Sunset Construction Co. since the 12th day of September, 1911, and in support of this assignment of error defendant Rauer refers to the matters and things set forth in Exceptions I, II, III and IV of this assignment of errors.

EXCEPTION X.

The defendant Rauer assigns as error that part of the Master's report finding that the sum of \$13,-023.19 has been received by the defendant Rauer from the Sunset Construction Co., a corporation, since February 19, 1915, and that the same is payable to the plaintiff trustee, because the evidence shows there was owing on said date to the defendant Rauer from the Sunset Construction Company the sum of \$18,746.22, and in not allowing the said credit due Rauer as an offset to said item of \$13,-023.19, and especially is this true and an assignment of error because the Master in his report relative to this item finds as follows:

“that Rauer must account to this trustee for [303] dealings with the company's assets owned on February 19, 1915, after that date, without the benefit of set-offs subsequently accruing. There are, of course, difficulties arising out of the fact that the company was never declared a bankrupt, and its creditors have not been scheduled and notified to file their claims, and that defendant Rauer will suffer loss by reason of the fact that he believed himself en-

titled to deal with the company after Buckman's bankruptcy as a separate entity, not affected by his bankruptcy."

And defendant Rauer assigns as error that part of the final decree adopting and confirming and embodying in the decree the aforesaid provision of the Master's report disallowing the right of off-set to Rauer of the amount owing by the Sunset Construction Co. to Rauer as of the date of the filing of the petition in bankruptcy by Buckman, and which assignment of error is the subject matter of Exception I of the exceptions filed by defendant J. J. Rauer to the Master's report herein, to which reference is made, with the request that said Exception I be read in connection with this assignment of error X.

EXCEPTION XI.

The final decree adopted in the Master's report, and the Master's report are erroneous in the following particulars, which the defendant Rauer hereby assigns as error; and hereby refers to the refusal of the Master to take into account the transactions between the defendant Rauer and the said Sunset Construction Co. of the moneys advanced or paid out by said Rauer after February 19, 1915, and prior to the making of the interlocutory decree and up to the time of the making of which said Rauer had no knowledge or notice that any contention was being made that he, Rauer, had no right to deal with the Sunset Construction Co. as a separate entity, and that he was being charged with the consequences of doing business with a declared [304]

bankrupt, and the refusal to take such transaction into account is injurious and damaging to this defendant Rauer, because the evidence shows that after the said 19th day of February, 1915, and prior to the making of said interlocutory order, the said Rauer had advanced the sum of \$18,561.54, which sum, plus the \$18,746.22 found by the Master to be owing to Rauer at the time of the petition in bankruptcy showed the sum of \$37,307.76, and the refusal to state such account is not in accordance with the terms of the order of reference, and which matters are included in Exception II of the exceptions filed by defendant Rauer to the Master's report, and for the reasons aforesaid the said account of the Master and the final decree made by this Court confirming said report, is alleged to be error.

EXCEPTION XII.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report wherein it is stated that the sum of money owing to defendant Rauer at the time of the filing of the petition in bankruptcy on February 19, 1915, by the Sunset Construction Co. was the sum of \$18,746.22, whereas and in fact the evidence shows that there was owing at said time by said corporation to said Rauer the sum of \$26,246.22, and this present assignment of error is the subject matter of Exception III of defendant Rauer's exceptions to the Master's report filed herein, and to which exception defendant

Rauer hereby refers and requests be considered in support of the present assignment of error.

EXCEPTION XIII.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars [305] which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report and findings wherein the Master finds that Rauer must account to Buckman's trustee for the sum of \$4,016.20 as moneys received by defendant Rauer as assets belonging to said corporation on February 19, 1915, and the collection of which was made by the defendant Rauer after said date, whereas as a matter of fact the evidence shows that the defendant Rauer should not be charged with any part of said sum of \$4,016.20, and the present assignment of error is the subject matter of Exception IV filed herein by the defendant Rauer to the Master's report, and to which reference is hereby made with the request that same be considered in support of the present assignment of error.

EXCEPTION XIV.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report and findings wherein the Master finds the defendant Rauer must pay to the trustee in bankruptcy the sum of \$9,016.90 for the rental value and use after February 19, 1915, of the equipment and personal property of the Sunset

Construction Co. mortgaged to the defendant Rauer, whereas the evidence shows that under no circumstances and upon any theory should the rental of said machinery exceed the sum of \$1,838.56, after making a proper deduction for repairs in connection with the upkeep of the said machinery as shown by the evidence; and this assignment of error is the subject matter of Exception V filed by the defendant Rauer to the report of the Master, and to which exception the defendant Rauer refers and requests be considered in support of this assignment of error. [306]

EXCEPTION XV.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report and findings which refuses and omits to allow the rental value of said machinery charged to the defendant Rauer as a credit on the mortgage indebtedness due Rauer, and to secure the payment of which the said property was mortgaged to Rauer with the right of possession upon default, as shown by the evidence, and this present assignment of error is the subject matter of Exception V filed by the defendant Rauer, and to which exception defendant Rauer refers and requests be considered in support of the present assignment of error.

EXCEPTION XVI.

The final decree adopted in the Master's report and the Master's report are erroneous in the fol-

lowing particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report wherein the Master finds and refuses to allow the defendant Rauer as an offset to the value of the use of the said personal property and equipment of the Sunset Construction Co., the cost of the repairing and maintaining of the property while in use, and refusing to allow the advances made by said Rauer to the Sunset Construction Co., or upon the debts that the Sunset Construction Co. owed, and which is the subject matter of Exception V of defendant Rauer's exceptions to the Master's report on file herein, and which exception the defendant requests be considered read in connection with and in support of this assignment of error. [307]

EXCEPTION XVII.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars which the defendant Rauer hereby assigns as error, and hereby refers to that part of the Master's report wherein it is found that the defendant Rauer shall be charged with the sum of \$5,381.79 as gross profits as received from the contract between the Federal Construction Company and the Sunset Construction Co. about January, 1915, whereas the evidence shows no part of said sum should be charged against the defendant Rauer, and this present assignment of error is the subject matter of Exception V of the exceptions filed by the defendant Rauer to the Master's report, and to which exception reference is hereby made,

and it is requested that the same be read in support of the present assignment of error.

EXCEPTION XVIII.

The final decree adopted by the Master's report and the Master's report are erroneous because it proceeds upon the construction and theory that the plaintiff's construction of the interlocutory decree and order of Sept. 11, 1916, is the right theory and construction of said decree, and in which connection the present assignment is the subject matter of Exception VI of the exceptions filed by the defendant Rauer to the report of the Master, and this assignment of error is also included in the subject matter of Exceptions I to VI, inclusive of this present writing and assignment of errors, and the defendant Rauer prays that the said Exception VI to defendant Rauer's exceptions to the Master's report, and the first six exceptions of the present assignments of error be read in connection with this present assignment of error, and in support thereof. [308]

EXCEPTION XIX.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant J. J. Rauer hereby assigns as error, and hereby refers to that part of the final decree numbered (3) wherein it is decreed that the sum of \$3,701.60 on deposit in the matter of the bankrupt estate of said A. E. Buckman, and belonging to the defendant Rauer, should be retained by the plaintiff and payment made to said J. J. Rauer by credit on the amount

found due by the report of said Rauer to the said plaintiff, whereas and in fact the evidence shows the said sum of money should be paid to the defendant Rauer, and there is nothing owing from the said defendant Rauer to the said trustee in bankruptcy.

EXCEPTION XX.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant J. J. Rauer, hereby assigns as error, and hereby refers to that part of the final decree numbered (4) wherein it is found that there is due from the defendant Rauer to the plaintiff trustee after crediting the said sum of \$3,701.60 now in possession of the Court and belonging to the defendant Rauer the sum of \$9,321.59, the same being moneys belonging to the estate of A. E. Buckman, the bankrupt, collected and wrongfully retained by the defendant Rauer, and which sum he is directed to pay to the said trustee, whereas the evidence shows that the defendant Rauer is not indebted in any sum of money to the plaintiff trustee on any account whatsoever.

EXCEPTION XXI.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant J. J. Rauer hereby assigns as error, and [309] hereby refers to that part of the final decree numbered (5), wherein it is found there is due from the estate in bankruptcy of Buckman to Rauer the sum of \$15,044.62 after crediting on the total amount due

J. J. Rauer from said estate the before mentioned sum of \$3,701.60, whereas and in fact the evidence shows if the erroneous theory be adopted that the said J. J. Rauer was transacting business with the estate of the bankrupt, and that the claim of said J. J. Rauer is against the estate of the bankrupt, and not as hereinbefore set forth, an indebtedness arising out of transactions between said J. J. Rauer and the Sunset Construction Co., there is due and owing from said estate to said J. J. Rauer over and above all just counterclaims and off-sets the sum of \$37,307.76.

EXCEPTION XXII.

The final decree adopted in the Master's report and the Master's report are erroneous in the following particulars, which the defendant J. J. Rauer, hereby assigns as error, and hereby refers to that part of the final decree numbered (6) giving a judgment in favor of plaintiff against the defendant Rauer for costs and disbursements upon the suit, whereas the evidence shows that nothing is owing from the defendant Rauer, and no judgment should go against him.

WHEREFORE this defendant prays that the said interlocutory order and decree of September 11, 1916 and the said final decree entered herein ratifying and confirming the Master's report, and said Master's report, and which interlocutory order and decree and final decree and Master's report are the subject matter of the foregoing assignment of errors, be reversed and set aside, and that this

defendant have such other and further relief as may seem meet and equitable.

H. M. ANTHONY,
GRANT & ZIMDARS,
WM. GRANT, and
J. B. ZIMDARS,

Solicitors for Appellant, J. J. Rauer.

[Endorsed]: Filed Nov. 18, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[310]

(Title of Court and Cause.)

Order Allowing Appeal from an Order or Decree made Herein on the 11th Day of September, 1916, Directing an Accounting and Referring the Matter of the Accounting to H. M. Wright, Master in Chancery of this Court, and also Allowing an Appeal from the Final Decree made Herein on the 6th Day of November, 1922, Disallowing and Overruling the Objections made by J. J. Rauer to the Account and Report Filed Herein by H. M. Wright, Master in Chancery, Pursuant to the Order of Sept. 11, 1916, and Confirming and Approving Said Report, and Decreeing that the Said J. J. Rauer, Defendant, Pay to the Plaintiff the Sums of Money in the Said Decree Specified; and Fixing the Amount of Supersedeas Bond and Bond for Costs on Appeal and Staying all

**Proceedings for the Enforcement of the Order
and Judgment, from Which the Appeal is
Taken.**

This day the defendant J. J. Rauer, a defendant in the above-entitled action appeared by his solicitors H. M. Anthony and Grant & Zimdars, and presented this petition for an appeal from an order or decree made herein on the 11th day of September, 1916, directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this Court, and also allowing an appeal from the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, pursuant to the order of Sept. 11, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified; and his assignment of errors accompanying the said petition, and by the said petition said defendant having requested this Court to fix the amount of a supersedeas bond, and also bond for costs and damages on appeal so as to effect a stay of proceedings on the enforcement of the said orders, decrees and judgments pending the appeal, the said petition, upon due consideration is hereby allowed, and an appeal from the said orders, decrees and judgments is hereby allowed to the United States Circuit Court of Appeals, Ninth Circuit, upon the filing of a bond in the sum

of Eleven Thousand Dollars (\$11,000) *Dollars*, with a good and sufficient surety to be approved by this Court, the said bond to operate as a supersedeas [311] bond for costs, and to fully stay all proceedings upon the orders, decrees and judgments appealed from pending the appeal; and

IT IS FURTHER ORDERED that a complete transcript of all records, proceedings and papers upon which the said order, decrees and judgments appealed from were based, fully authenticated, be certified and sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated this 18th day of November, 1922.

WM. C. VAN FLEET,

Judge of Said Court.

[Endorsed]: Filed Nov. 18, 1922. W. B. Mal-
ing, Clerk. By J. A. Schaertzer, Deputy Clerk.
[312]

(Supersedeas Bond on Appeal.)

The premium charged for this bond is \$110.00 Dollars per annum.

KNOW ALL MEN BY THESE PRESENTS, That we, J. J. Rauer, as principal, and Fidelity and Deposit Company of Maryland, as sureties, are held and firmly bound unto George J. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, a bankrupt, in the full and just sum of Eleven Thousand (\$11,000) Dollars, to be paid to the said George J. Hatfield, as trustee, as afore-said, his successors, certain attorney, executors,

administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of November in the year of our Lord One Thousand, Nine Hundred and Twenty-two.

WHEREAS, lately at Southern Division District Court of the United States for the Northern District of California in a suit depending in said Court, between the aforesaid George J. Hatfield, as trustee in bankruptcy, as plaintiff, and A. E. Buckman, J. J. Rauer and others, defendants, No. 233 in Equity, an order and decree was entered directing an accounting between the said Hatfield, as trustee, as aforesaid, and the said Defendant Rauer, and thereafter a decree was entered whereby it was adjudged and decreed that the said plaintiff recover from the said defendant Rauer the sum of \$9,321.59, with interest from the 6th day of November, 1922, and costs, and directing the said Rauer to pay said sum to the said plaintiff, and the said defendant obtained from said Court in the aforesaid suit an order allowing an appeal to the United States Circuit Court of Appeals to reverse the said order and decree in the aforesaid suit, and the said Court having fixed upon the said sum of \$11,000 as a supersedeas bond and for costs and to fully stay all proceedings upon said order and decree appealed from pending the appeal, and said Rauer having obtained a citation directed to said plaintiff and the other [313] parties to the suit

citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said J. J. Rauer shall prosecute said appeal to effect, and answer all damages and costs if he fail to make said appeal good, then the above obligation to be void; else to remain in full force and virtue.

Acknowledged before me the day and year first above written.

J. J. RAUER. (Seal)

FIDELITY AND DEPOSIT CO. of MD.

By F. E. Brisbine (Seal)

Attorney in Fact.

E. K. McCOORY (Seal)

Agent.

Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 21, 1922. Walter B. Maling, Clerk. [314]

(Title of Court and Cause.)

Praeipie for Preparing Record on Appeal.

To the Clerk of the Above-entitled Court:

Sir:

You will please prepare transcript of record in the above-entitled cause to be in the office of the Clerk of the United States Circuit Court of Appeals

for the Ninth Judicial District, pursuant to the appeal theretofore allowed herein and directed to said Court from an order or decree made herein on the 11th day of September, 1916, including the order directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this Court, and from the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, pursuant to the order of September 11th, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified, and include in the said transcript the following proceedings, pleadings and papers on file, to wit:

1. The complaint or bill in said action.
2. The answer of the defendants thereto.
3. Supplement to the bill, and answer.
4. The interlocutory decree therein.
5. Report of the Master and suggestions for judgment.
6. Exceptions of the defendant J. J. Rauer to the Master's Report, and being the exceptions filed with the objections of Defendant Rauer to the Special Master's petition for compensation.
7. Order confirming the report of the Master.
8. Order and decree filed herein September 30, 1922, fixing the compensation and over-

ruling defendants' objections to Master's report, together with opinion of Court.

9. Decree confirming Master's report and giving judgment in favor of the plaintiff in said action against the defendants [315] therein as in said decree specified.
10. Defendant Rauer's petition for appeal from order or decree made herein on the 11th day of September, 1922, including the order directing an accounting and referring the matter of the accounting to H. M. Wright, Master in Chancery of this Court, and from the final decree made herein on the 6th day of November, 1922, disallowing and overruling the objections made by J. J. Rauer to the account and report filed herein by H. M. Wright, Master in Chancery, pursuant to the order of September 11, 1916, and confirming and approving said report, and decreeing that the said J. J. Rauer, defendant, pay to the plaintiff the sums of money in the said decree specified.
11. Defendant's assignment of error on appeal from the said last mentioned orders and decrees.
12. Order allowing appeal from the said orders and decrees and fixing bond on appeal and to stay proceedings.
13. Bond on appeal from said last mentioned order.
14. Citation on appeal, admission and affidavit of service from the said last mentioned order.

15. Statement on appeal.

16. This praecipe.

Said transcript to be prepared as required by law, and the rules of the United States Circuit Court of Appeals on or before the 28 day of August, 1923.

Dated at San Francisco, California, this 17 day of August, 1923.

J. J. RAUER,

Defendant and Appellant Herein.

H. M. ANTHONY and

GRANT & ZIMDARS,

His Solicitors.

Receipt of copy of the above admitted this 18 day of August, 1923.

ED. H. WILLIAMS,

CHARLES S. WHEELER and

CHARLES S. WHEELER, Jr.,

Solicitors for Plaintiff and Respondent.

[Endorsed]: Filed Aug. 20, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[316]

(Title of Court and Cause.)

**Demand for Additions to Transcript as Designated
in Praecipe of Appellant.**

To the Clerk of the Above-entitled Court:

You are hereby requested to include in the transcript of the record in the above-entitled cause, in addition to the papers designated in the praecipe heretofore filed by appellant, the following:

1. Order substituting Geo. J. Hatfield, Trustee, as complainant in the above-entitled action.
2. Order of reference to H. M. Wright as Master in Chancery to take accounting.
3. Order continuing in effect the authority of H. M. Wright as Master of Chancery to head accounting.
4. Report of Master should include portions thereof entitled "Observations on Master's Report."

Dated: August 28, 1923.

E. H. WILLIAMS,

CHARLES S. WHEELER and

CHARLES S. WHEELER, Jr.,

Solicitors for Geo. J. Hatfield, Trustee, etc., Complainant Herein.

Due service and receipt of a copy of the within praecipe on part of plttf. this 28th day of August, 1923, is hereby admitted.

H. M. ANTHONY and

GRANT & ZIMDARS,

Attorneys for Defendants.

[Endorsed]: Filed Aug. 29, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.
[317]

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing three hundred seventeen (317) pages, numbered from 1 to 317, inclusive, to be a full, true and cor-

rect copy of the record and proceedings in the above-entitled cause as enumerated in the praecipis for records on appeal, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals, for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is \$132.90; that said amount was paid by defendant, J. J. Rauer; and that the original citations issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30th day of August, A. D. 1923.

[Seal]

WALTER B. MALING,
Clerk United States District Court for the North-
ern District of California. [318]

Citation on Appeal—Dated October 16, 1922.

United States of America,—ss.

The President of the United States, to George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt, and to Messrs. E. H. Williams, Charles S. Wheeler and Charles S. Wheeler, Jr., His Solicitors and Attorneys, H. M. Wright, A. E. Buckman, William H. Chapman, Fillmore Buckman, J. A. Meadows, Sunset Construction Company, a Corporation, and J. A. Meadows, John McCoy and A. E. Buckman, Trustees of the Defendant, Sunset Construction Company,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the United States District Court for the Southern Division of Northern District of California, in that certain action wherein George H. Hatfield, as Trustee in Bankruptcy, is plaintiff, and the defendants in the said action are A. E. Buckman, J. J. Rauer, William H. Chapman, Fillmore Buckman, J. A. Meadows and Sunset Construction Company, a corporation, and J. A. Meadows, John McCoy and A. E. Buckman, as Trustees of the Sunset Construction Company, a corporation, and in which appeal J. J. Rauer is the appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 16th day of October, A. D. 1922.

WM. C. VAN FLEET,
United States Dist. Judge. [319]

United States of America,—ss.

On this 2d day of November, in the year of our Lord one thousand nine hundred and twenty-two, personally appeared before me, Roy E. Clark, the subscriber, a citizen of the United States of America, and the State of California, and over the age of 21 years, and makes oath that he delivered a true copy of the within citation to John McCoy, within named, on the 31st day of October, 1922, in the city and county of San Francisco, State of California.

R. E. CLARK.

Subscribed and sworn to before me at San Francisco, this 2d day of November, A. D. 1922.

[Seal] CHARLES R. HOLTON,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires Sept. 16, 1926.

Service of copy of the within citation on appeal hereby admitted this 18 day of October, 1922.

CHARLES S. WHEELER and
CHARLES S. WHEELER, Jr.,
ED. H. WILLIAMS,

Attys. for Plaintiff.

H. M. WRIGHT.

(Reserving Objections to Duplicity of Appeal.)

WM. H. CHAPMAN.

[Endorsed]: No. 233—Equity. United States District Court, Southern Division for the Northern District of California. J. J. Rauer, Appellant, vs.

George H. Hatfield, etc., Appellees. Citation on Appeal. Filed Nov. 6, 1922. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

Citation on Appeal—Dated December 2, 1922.

United States of America,—ss.

The President of the United States, to George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt, and to Messrs. E. H. Williams, Charles S. Wheeler and Charles S. Wheeler, Jr., His Solicitors and Attorneys, and A. E. Buckman, William H. Chapman, Fillmore Buckman, J. A. Meadows, Sunset Construction Company, a Corporation, and J. A. Meadows, John McCoy and A. E. Buckman, Trustees of the Defendant, Sunset Construction Company, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's Office of the Southern Division United States District Court for the Northern District of California, in that certain action wherein George H. Hatfield, as Trustee in Bankruptcy, is plaintiff, and the defendants in the said action are A. E. Buckman, J. J. Rauer, William H. Chapman, Fillmore Buckman, J. A. Meadows and Sunset Construction Com-

pany, a corporation, and J. A. Meadows, John McCoy and A. E. Buckman, as Trustees of the Sunset Construction Company, a corporation, and in which appeal J. J. Rauer is the appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. C. VAN FLEET, United States District Judge for the Northern District of California, this 2d day of December, A. D. 1922.

WM. C. VAN FLEET,
United States District Judge. [320]
United States of America,—ss.

On this 15th day of December, in the year of our Lord one thousand nine hundred and twenty-two, personally served John McCoy, the subscriber, and makes oath that he delivered a true copy of the within citation to John McCoy.

R. E. CLARK.

Subscribed and sworn to before me at San Francisco, Cal., this 4th day of January, A. D. 1923.

[Seal] CHARLES R. HOLTON,
Notary Public, San Francisco, California.

Receipt of copy of the within citation on appeal hereby admitted this 5th day of December, 1922.

WM. H. CHAPMAN,
E. D. WILLIAMS,
CHARLES S. WHEELER and
CHARLES S. WHEELER, Jr.

By C. A. W.

[Endorsed]: No. 233—Eq. United States District Court, Southern Division for the Northern District of ———. J. J. Rauer, Appellant, vs. George H. Hatfield, etc., et al., Appellees. Citation on Appeal. Filed Jan. 5, 1923. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 4091. United States Circuit Court of Appeals for the Ninth Circuit. J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt, and H. M. Wright, A. E. Buckman, William H. Chapman, Fillmore Buckman, J. A. Meadows, Sunset Construction Company, a Corporation, and J. A. Meadows, John McCoy and A. E. Buckman, Trustees of the Defendant, Sunset Construction Company, Appellees, and J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, Bankrupt, and A. E. Buckman, William H. Chapman, Fillmore Buckman, J. A. Meadows, Sunset Construction Company, a Corporation, and J. A. Meadows, John McCoy and A. E. Buckman, Trustees of the Defendant, Sunset Construction Company, Appellees. Transcript of Record. Upon Appeals from the Southern Division of the United States District Court for the Northern District of California, Third Division.

Filed August 31, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bank-
ruptcy of the Estate of A. E. BUCKMAN,
a Bankrupt, H. M. WRIGHT, et al.,
Respondents.

**Order Allowing Time to File Transcript of Record
on Appeal, and to Docket the Said Cause, in
the Matter of Appeal from the Judgment Di-
recting an Accounting and Confirming the Ac-
count of the Referee Made on the 18th day of
November, 1922, and Which Judgment was
Made and Entered in that Certain Action No.
233 in Equity, in the Southern Division of the
United States District Court for the Northern
District of California, in that Certain Action
Entitled George H. Hatfield, as Trustee in
Bankruptcy, vs. A. E. Buckman, et al., De-
fendants; and Extending Time in which to
Prepare the Statement on Appeal in Said
Cause.**

Good cause appearing therefor, it is hereby or-
dered that the return day of the citation on the
above mentioned appeal to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, in
the above-entitled suit, be and the same is hereby

extended to the 31st day of August, 1923, and that the said Rauer, defendant and appellant, may have and he is hereby granted to and including said 31st day of August, 1923, in which to file, in the office of the Clerk of this Court, the transcript of the record on appeal and to docket said cause in this court, and within which time to prepare the statement on appeal in said cause.

Dated this 27th day of August, 1923.

W. H. HUNT,
Circuit Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, a Bankrupt, H. M. Wright, et al., Respondents. Order Allowing Time to File Transcript of Record on Appeal and to Docket the Said Cause, in the Matter of the Appeal from the Judgment Directing an Accounting and Confirming the Account of the Referee, etc. Filed Aug. 28, 1923. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bank-
ruptcy of the Estate of A. E. BUCKMAN,
a Bankrupt, H. M. WRIGHT, et al.,
Respondents.

**Order Allowing Time to File Transcript of Record
on Appeal and to Docket Said Cause in the
Matter of the Appeal from the Order Allowing
Appeal from Order Made and Filed in Said
Cause on September 30, 1923, Fixing Compens-
ation of the Master, H. M. Wright, Esq., and
Directing the Payment of the Same by J. J.
Rauer, Which Order was Made in Said Action
No. 233 Equity, in the Southern Division of the
United States District Court for the Northern
District of California.**

Good cause appearing therefor, it is hereby or-
dered that the return day of the citation on the
above mentioned appeal to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, in the
above-entitled action, be and the same is hereby
extended up to and including the 31st day of Au-
gust, 1923; and that said J. J. Rauer, defendant in
said action and appellant herein, may have and he
is hereby granted to and including the 31st day

of August, 1923, in which to file in the office of the Clerk of this Court the transcript of the record on appeal and to docket said cause in this court.

Dated this 27th day of August, 1923.

W. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. —. In the United States Circuit Court of Appeals for the Ninth Circuit. J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, a Bankrupt, H. M. Wright, et al., Respondents. Order Allowing Time to File Transcript of Record on Appeal and to Docket Said Cause in the Matter of the Appeal from the Order Allowing Appeal * * * and Fixing the Compensation of the Master, etc. Filed Aug. 28, 1923. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for
the Ninth Circuit.

J. J. RAUER,

Appellant,

vs.

GEORGE H. HATFIELD, as Trustee in Bankruptcy of the Estate of A. E. BUCKMAN, a Bankrupt, H. M. WRIGHT, et al.,
Respondents.

In the Matter of the Appeal from the Order Allowing Appeal from Order Made and Filed in Said Cause on September 30, 1923, Fixing Compensation of the Master, H. M. Wright, Esq., and Directing the Payment of the Same by J. J. Rauer, Which Order was Made in Said Action No. 233 Equity, in the Southern Division of the United States District Court for the Northern District of California.

In the Matter of the Appeal from the Judgment Directing an Accounting and Confirming the Account of the Referee Made on the 18th Day of November, 1922, and Which Judgment was Made and Entered in that Certain Action No. 233 in Equity, in the Southern Division of the United States District Court for the Northern District of California, in that Certain Action Entitled George H. Hatfield, as Trustee in Bankruptcy, vs. A. E. Buckman, et al., Defendants, and Extending Time in Which to Prepare the Statement on Appeal in Said Cause.

WHEREAS, as above indicated, there are two separate appeals in the above-entitled cause, and, to avoid inclusion of more than one copy of the same paper in the record on appeal,

IT IS ORDERED, that the two appeals be heard on one record on appeal, and that the said record shall contain a copy without duplication of every

paper and record provided for by the praecipe in each appeal.

Dated this 28th day of August, 1923.

HUNT,
Circuit Judge.

[Endorsed]: No. —. In the United States Circuit Court of Appeals for the Ninth Circuit. J. J. Rauer, Appellant, vs. George H. Hatfield, as Trustee in Bankruptcy of the Estate of A. E. Buckman, a Bankrupt, H. M. Wright, et al., Respondents. Order Consolidating Appeals. Filed Aug. 28, 1923. F. D. Monckton, Clerk. Refiled Aug. 31, 1923. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

